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**YET ANOTHER CALL FOR A GREATER ROLE FOR GOOD FAITH IN THE
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AM Louw*

Parties to a contract must adhere to a minimum threshold of mutual respect in which the "unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts" ... The task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution.¹

If, through inexperience, carelessness or weakness of character, [a man] has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the marketplace.²

Welcome to the jungle/It gets worse here every day/You learn to live like an animal/In the jungle where we play/If you've got a hunger for what you see/You'll take it eventually/You can have anything you want/But you better not take it from me/In the jungle/Welcome to the jungle/Watch it bring you to your knees (I'm gonna watch you bleed).³

1 Introduction

One of the most vexing questions in recent years in South African private law has been the proper role and meaning of good faith (or *bona fides*) in contracting,⁴ and

* Andre M Louw. LLD (Stellenbosch). School of Law, University of KwaZulu-Natal, Durban. Email: louw@ukzn.ac.za. This piece is dedicated to the memory of the late Honourable Mr Justice PJJ Olivier of the Supreme Court of Appeal, whose progressive and potentially ground-breaking minority judgment in *Eerste Nasionale Bank van SA v Saayman* 1997 4 SA 302 (SCA) was subsequently so reviled by his colleagues on the court. My colleagues have been more kind, and I wish to express my heartfelt thanks to Rob Sharrock and Lienne Steyn, who read an advanced draft of this piece and provided me with much-needed advice on how to avoid making a fool of myself.

¹ Davis J in *Mort v Henry Shields-Chiat* 2001 1 SA 404 (C) 475A-E.

² Hahlo 1981 *SALJ* 70.

³ W Axl Rose - Guns 'n Roses "Welcome to the jungle" *Appetite for Destruction* (Geffen Records ©1987).

⁴ As Hawthorne observes, "[t]he recognition of the influence of good faith in the South African law of contract ranges from acknowledgment to denial" - Hawthorne 2003 *SAMLJ* 272. And: "In recent years, in South Africa, good faith has regularly been brought out of the display cabinet,

the approach of our courts to the application of this principle in individual cases involving claims of unfairness and the like. Quite a number of commentators have written - sometimes very eloquently⁵ - about the issue. I doubt that I can match the level of insight (or, sadly, the eloquence) brought to the debate by some more seasoned and esteemed contract law experts, but I hope that this piece can provide yet another passionate plea for our apex courts to settle the question once and for all, and to provide the necessary (and long-overdue) guidance to the lower courts, legal advisors, academics, law students, and - last but not least - all of us who enter into contracts on a daily basis.

The root of the problem seems to stem from that series of well-known and much-maligned⁶ judgments by the Supreme Court of Appeal (or SCA) in the past decade which dealt with good faith or arguments regarding substantive fairness, ranging from *Brisley*,⁷ *Afrox*,⁸ and *Napier*,⁹ through to *Bredenkamp*,¹⁰ *Maphango*¹¹ and *Potgieter*.¹² Many a law journal's pages has been filled with analyses of these judgments, and I will deal with them only very briefly in this piece. In the midst of sometimes vociferous criticism of the SCA's arguably overly-conservative approach to good faith in these cases, some have pinned their hopes for law reform on the Constitutional Court (or CC). Sadly, the first (and to date, only) contract law matter to reach our highest court and to be considered on the merits - the landmark case of *Barkhuizen v Napier*,¹³ which has provided such fruitful grist for the academic mill - saw both a controversial¹⁴ majority and some divergent minority judgments which

dusted off, and heralded as the basis of all law of contract, only then to be put away having become nothing more than a glass figurine. Good faith is so fragile that actually to use the concept to introduce equity into our law of contract would cause such uncertainty that our classical contract law will be undermined and rendered unworkable." Hawthorne 2005 *SAMLJ* 214. See also Hutchison 2012 *Stell LR* 416-419.

⁵ See, for example, Barnard-Naudé 2008 *Constitutional Court Review* 155-208.

⁶ See, for example, Bhana and Pieterse 2005 *SALJ* 865; Bhana 2007 *SALJ* 269; Davis 2011 *Stell LR* 845-864.

⁷ *Brisley v Drotosky* 2002 4 SA 1 (SCA).

⁸ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA).

⁹ *Napier v Barkhuizen* 2006 4 SA 1 (SCA).

¹⁰ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA).

¹¹ *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA).

¹² *Potgieter v Potgieter* 2011 ZASCA 181.

¹³ *Barkhuizen v Napier* 2007 5 SA 323 (CC).

¹⁴ See Woolman 2007 *SALJ* 762; Woolman 2008 *SALJ* 10; Sutherland 2008 *Stell LR* 390; Rautenbach 2009 *TSAR* 613.

focused largely on different (although related) issues. Yet - interestingly - we need to bear in mind that the majority of the court, by way of Ngcobo J, appeared to expressly leave open the door for future development of good faith in contracting (possibly implying that the *status quo* as emanating from the SCA may very well be wrong).¹⁵ Some judges of the same court (in the more recent matter of *Everfresh Market Virginia v Shoprite Checkers*)¹⁶ have now appeared to nudge that door even wider, and I think we are starting to feel a draught that might promise to blow away the cobwebs of many years of judicial conservatism on the issue of substantive equity in contract law. I am not the only person who believes that the CC may actually presently be champing at the bit to rewrite our law on good faith in contracts, and there is a likelihood that events may overtake me and that an appropriate case to facilitate such development of the law may reach the CC even before this piece is published.¹⁷ I do believe that the SCA's conservatism means - and this notwithstanding the paucity of contract law cases which reach the CC - that the chances are that law reform on this issue is currently more likely to emanate from Braamfontein than from Bloemfontein.¹⁸

Undoubtedly, the greatest catalyst for the current debate about the role of good faith has been the entry - albeit, at times, kicking and screaming - of our common law of contract into the new constitutional dispensation. While some have been

¹⁵ See Barnard-Naudé 2008 *Constitutional Court Review* 187, and the discussion in s 3 in the text below.

¹⁶ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).

¹⁷ There are indications that recent litigation involving franchise agreements between Woolworths (Pty) Ltd and a KwaZulu-Natal franchisee, Dula Investments (Pty) Ltd, in which arguments were brought (unsuccessfully) before both the Western Cape High Court and the KwaZulu-Natal High Court (Durban) regarding the application of the principle of *ubuntu* as incorporating and requiring a robust notion of good faith in respect of extension clauses, may be on its way to the Supreme Court of Appeal (and, possibly, from there to the Constitutional Court). Traverso DJP provided the respondent leave to appeal to the Supreme Court of Appeal against her judgment in *Woolworths (Pty) Ltd v Dula Investments (Pty) Ltd* 2012 ZAWCHC 183, which appeal is apparently pending at the time of writing. Whether this is an appropriate case, on the facts, for consideration of these issues regarding good faith and *ubuntu*, however, is questionable.

¹⁸ It currently appears unlikely that the Supreme Court of Appeal would seriously reconsider its established views on the role of good faith (as described in s 2 in the text below) at this point in time, especially if one considers the views expressed by Brand JA in *Potgieter v Potgieter* 2011 ZASCA 181 para 34 (the learned judge appears to have lobbed the ball squarely in the court of the eleven judges sitting on Constitution Hill, although the appropriateness of this judicial reluctance on the part of the SCA is questionable - see De Vos 2011 constitutionallyspeaking.co.za).

heard to lament the "constitutional colonization of the common law"¹⁹ - a misplaced but hardly original response by lawyers so well schooled (or mired?) in black letter, doctrinal law²⁰ - it is hard to imagine a more apt breeding ground for the development of a robust concept of good faith in contracting than the foundational values of the Bill of Rights and the transformative and developmental ethos of our *Constitution*.²¹ The drafters of the *Constitution* chose not to entrench freedom of contract as a fundamental right in the Bill of Rights, even though its importance as a constitutional value appears to have been recognised on occasion.²² But if one considers the importance of the law of contract (and contracts as private law mechanism for the ordering of our social and economic relations) for the furtherance of a number of the other, entrenched rights in the Bill of Rights,²³ it is truly surprising that this common law system appears, at least at first glance, to have been so significantly isolated from the constitutional project by the higher courts.²⁴ According to *Everfresh*, possibly the most important constitutional value which provides a basis for such development is the value system of *ubuntu*; and the *Constitution* has brought with it increased calls for greater substantive equity in contracts more generally. In the light of the fact that recent decades have seen the concept of "fairness" assume central importance in respect of certain specific types of contracts (compare, for example, the prominent role attached through the means of labour legislation to substantive fairness in respect of various aspects of the employment contract; compare also the role of fairness as encapsulated in consumer contracts via the more recent *Consumer Protection Act*),²⁵ it seems strange that a

¹⁹ See, for example, Jordaan 2004 *De Jure* 58.

²⁰ See Rautenbach 2009 *TSAR* 616-617 regarding the experience in Western European jurisdictions.

²¹ The *Constitution of the Republic of South Africa*, 1996.

²² See Malan AJA in *Reddy v Siemens* 2006 SCA 164 (SA) para 15; see also Brand JA in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 23; Rautenbach 2009 *TSAR* 624-631.

²³ See Rautenbach 2011 *THRHR* 521.

²⁴ Bhana and Pieterse 2005 *SALJ* 889 call good faith "arguably one of the most viable avenues through which to align the common law of contract with the values underlying the Constitution".

²⁵ *Consumer Protection Act* 68 of 2008. See, for example, Koep 2012 altumsonatur.wordpress.com. Davis 2011 *Stell LR* 862 views the judgments emanating from the Supreme Court of Appeal in cases such as *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) and *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) as inconsistent with the *Consumer Protection Act's* approach to equity in (consumer) contracts: "This new legislation introduces a number of value laden concepts such as whether an agreement is 'excessively one sided in favour of any person other than the consumer' or 'the terms are so adverse to the consumers to be inequitable'. Thus the recent judicial record, in which the substance of the contractual outcome circumvents the implications of the Constitution and thus restricts the development of the general principles of

concept such as good faith - which deals so fundamentally with issues of fairness and fair dealing between individuals²⁶ - should remain so elusive or under-valued in the general common law of contract.²⁷ And, in the light of the key role of our constitutional values, it is strange that good faith, specifically, has not served to greedily soak up the spirit, purport and objects of the Bill of Rights. After all, it has (elsewhere) been observed that "the doctrine of good faith is the legal equivalent of a chameleon - it takes on the characteristics of its environment".²⁸ This doctrine has, to date, failed to do so in our new democratic state. Accordingly, the time remains ripe for the courts to finally settle the question of the proper role and importance of good faith in our law of contract, and, as mentioned, I believe that we are poised to see such development sooner rather than later. Ironically, however, I will suggest that we might find some food for thought (and even encouragement) in this regard in a most unlikely place - a recent judgment in the English law of contract,²⁹ a jurisdiction that has never been a poster child for the recognition of a robust role for good faith in contracting.³⁰

This piece seeks to add yet another plaintive voice to the call for such judicial development of a greater role for good faith, and to suggest why those opposed to the prospect of the often-raised threat of potential legal uncertainty - which is so frequently alleged to be an occupational hazard for those who engage in the

the law of contract, would, to a large degree, work to subvert the very purpose of this legislation."

²⁶ As Bhana and Pieterse observe, good faith is reconciled with the value of *pacta sunt servanda*, and it is asserted that the presence of consensus, coupled with the value of good faith, "renders our law of contract inherently equitable - the concept of good faith is said to have infused the law of contract with an equitable spirit". The authors observe that this interpretation of good faith "thus obviates engagement with the equity and fairness of a contract and so defends the lack of a substantive equitable defence in South African contract law". Bhana and Pieterse 2005 *SALJ* 867-868 (and 868 fn 12).

²⁷ Bhana and Pieterse 2005 *SALJ* 889 believe that good faith is "arguably one of the most viable avenues through which to align the common law of contract with the values underlying the Constitution".

²⁸ Leonhard 2009-2010 *Conn J Int'l L* 308.

²⁹ *Yam Seng PTE Ltd v International Trade Corporation Ltd* 2013 EWHC 111 (QB).

³⁰ As Vanessa Sims has observed, good faith has proven to be "one of the most controversial topics under discussion in modern English contract law" - Sims 2005 *KCLJ* 293; see also Piers 2011 *Tul Eur & Civ LF* 130 *et seq.*

application of an overly-robust doctrine of good faith³¹ - may in fact have little to fear. I would like the readers to ask themselves the following question: Why does the South African law of contract - after 20 years of democracy under one of the most progressive constitutions in the world - not currently recognise a robust role for good faith, when the jurisdiction of New York (the quintessential "concrete jungle", which many lay observers would probably view as synonymous with the "law of the jungle" in commercial dealings) has for quite some time ascribed a very important role to good faith in contracting?³² It appears that the South African jurisdiction is currently - as it was put recently in respect of the position in English law - 'swimming against the tide' when compared to other (especially, of course, civil law) jurisdictions when it comes to this issue. Be that as it may, I have no intention to deny the risks inherent in an over-emphasis on vague notions of good faith, especially the fears of legal uncertainty which have so occupied the minds of our appellate judges.³³ I believe, however, that a proper understanding of the nature, meaning, and content of a more robust, overarching requirement of good faith in contract law may serve to quell the fears brought about by that huge, ever-present and colourfully fluorescent elephant in the room - the spectre of unacceptable and

³¹ See, for example, Brand 2009 *SALJ* 89-90: "If we have learnt anything from what happened in the past in South African courts, it is this: imprecise and nebulous statements about the role of good faith, fairness and equity, which would permit idiosyncratic decision-making on the basis of what a particular judge regards as fair and equitable, are dangerous. They lead to uncertainty and a dramatic increase in often pointless litigation and unnecessary appeals. Palm-tree justice cannot serve as a substitute for the application of established principles of contract law."

³² The rule was famously summarised in 1933 by the New York Court of Appeals as imposing an implied covenant that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing" - *Kirke La Shelle Company v The Paul Armstrong Company* 263 NY 79; 188 NE 163; 1933 NY 167 (as recently confirmed again in *ABN AMRO Bank, NV v MBIA Inc* 2011 NY Slip Op 5542, 11-12 (2011)). See also, for example, the following as contained in the California Civil Jury Instructions (A 325: Breach of Covenant of Good Faith and Fair Dealing): "In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract."

³³ Lewis succinctly explains the conventional understanding of certainty in the law of contract: "The principle of contractual certainty holds that the very essence of a contract is that it provides certainty as to the relationship between the contracting parties and thus allows each party to plan its future conduct safely. If the possibility existed that certain contractual terms would at some stage be found to be non-binding (because they are unfair) this certainty would vanish. Attached to this argument of principle is the contingent claim that reform would produce a flood of litigation and that courts would be saddled with hundreds of 'hard luck' cases." Lewis 2003 *SALJ* 344.

potentially catastrophic legal uncertainty which may flow from subjective judicial decision-making based on imprecise notions and "abstract values", such as fairness and reasonableness. I will argue that the SCA's reservations regarding this aspect of good faith may have been overstated to date, and that we can fruitfully - and safely - negotiate a greater role for this principle without risking an end to contract law and our system of commerce. Probably rather paradoxically, I would suggest that those sometimes-maligned, "vague and woolly" constitutional values provide us with a way to circumvent the claims of potential uncertainty on the basis of what you and I - in our constitutional dispensation³⁴ - believe to be the 'done thing' in concluding and enforcing contracts.

In the following section I will briefly examine the current approach of our courts to the role of good faith in contracts, as well as the courts' stated reasons for this approach. This overview will be brief and I will just skim the surface, seeing that many others have written (in much more depth) about the existing legal position.³⁵ In section 3, I will then briefly examine how arguments based on good faith have fared in the CC to date, and the prospects for law reform to emanate from that court in the near future. I will then, in section 4, suggest an understanding of good faith which I believe is in line with the Constitution, and I will argue that in terms of such an understanding of a robust good faith doctrine we can avoid some of the dangers that the judges of the SCA have warned us about in this context in recent years. Finally, in section 5, I will include some concluding thoughts on the pressing need for law reform in this regard.

³⁴ Under a constitution that - in the words of Barnard-Naudé - "aspires to the post-liberal ideal of civic friendship precisely because of its foundational injunction to respect the dignity of all others"; see Barnard-Naudé 2008 *Constitutional Court Review* 202.

³⁵ See, for example, Bhana and Pieterse 2005 *SALJ*.

2 The current role and understanding of good faith in contract law, and why it is so problematic

One of the stalwarts of the Supreme Court of Appeal bench in the past decade or so has provided a succinct definition of good faith as it is apparently understood by our courts (or has been understood to date):³⁶

[I]n South African legal parlance, the concept of bona fides or good faith has acquired a meaning wider than mere honesty or the absence of subjective bad faith. According to this extended meaning, it has an objective content which includes other abstract values such as justice, reasonableness, fairness and equity.

Ngcobo J, in the Constitutional Court's judgment in *Barkhuizen*, confirmed that good faith encompasses the concepts of justice, reasonableness and fairness.³⁷ And, of course, therein lies the rub: it is essentially the constitutive components of such abstract values – "justice", "fairness", "reasonableness" and "equity" – which have raised the hackles of appellate judges and have so bedevilled the courts' recognition of a robust duty of good faith and the recognition of a more fundamental and overarching role for good faith in the enforcement of contracts and contract terms. The SCA's current understanding of the proper role for good faith to play in contract law is well summarised in the words of Hutchison's "cautious statement"³⁸ (and is worth quoting again here, especially seeing that the court in *Brisley* relied so fully on the following passage as reflecting the correct position in our law):³⁹

What emerges quite clearly from recent academic writing and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only

³⁶ See Brand 2009 *SALJ* 73.

³⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 80.

³⁸ Hawthorne is of the opinion that in *Brisley v Drotzky* 2002 4 SA 1 (SCA) the Supreme Court of Appeal "did not abandon good faith but clamped on to one of Hutchinson's cautious statements and agreed that it was a basic principle, which generally underpinned the law of contract". Hawthorne 2003 *SAMLJ* 275.

³⁹ Hutchison 2001 *SALJ* 743-744, as quoted in *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 22.

value or principle that underlies the law of contract; nor, perhaps, even the most important one.

This view of the role of good faith has been confirmed, consistently, by the SCA,⁴⁰ but ours is not the only system where courts have displayed a conservative stance on the subject of good faith. In a recent judgment of the Queen's Bench,⁴¹ Leggatt J explained the reasons for the apparently negligible role of good faith as a general principle in English contract law.⁴²

One should naturally have a measure of sympathy for the members of the SCA, and understanding for their apparent reticence to display any form of encouragement which might lead their many critics to discern a willingness to proactively develop a

⁴⁰ For example, as it was expressed in the well-known dictum from *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 27: "[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty." See also *Brisley v Drotosky* 2002 4 SA 1 (SCA) paras 21-24, 93-95; *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA) para 22-25; *Potgieter v Potgieter* 2011 ZASCA 181 para 32.

⁴¹ *Yam Seng PTE Ltd v International Trade Corporation Ltd* 2013 EWHC 111 (QB).

⁴² The learned judge explained it as follows: "The general view among commentators appears to be that in English contract law there is no legal principle of good faith of general application ... Three main reasons have been given for what [has been called] the 'traditional English hostility' towards a doctrine of good faith ... The first is ... that the preferred method of English law is to proceed incrementally by fashioning particular solutions in response to particular problems rather than by enforcing broad overarching principles. A second reason is that English law is said to embody an ethos of individualism, whereby the parties are free to pursue their own self-interest not only in negotiating but also in performing contracts provided they do not act in breach of a term of the contract. The third main reason given is a fear that recognising a general requirement of good faith in the performance of contracts would create too much uncertainty. There is concern that the content of the obligation would be vague and subjective and that its adoption would undermine the goal of contractual certainty to which English law has always attached great weight. In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide ..." [Extracts taken from para 121 *et seq.* of the judgment.] Naudé points out that a recent *Australian Consumer Law Consultation Paper* intentionally left out reference to good faith in proposals for consumer legislation given the "uncertain application of that principle in Australian law" - see Naudé 2009 *SALJ* 517-518 (fn 69). Australian courts have, like their South African counterparts, also devalued the role of fairness in contract law under the classical liberal theory of contract: "The law of contract which underpins the economy, does not, even today, operate uniformly upon a principle of fairness. It is the essence of entrepreneurship that parties will sometimes act with selfishness. That motivation may or may not produce fairness to the other party. The law may legitimately insist upon honesty of dealings. However, I doubt that, statute or special cases apart, it does or should enforce a regime of fairness upon the multitude of economic transactions governed by the law of contract." As per Kirby P in *Biotechnology Australia Pty Ltd v Pace* 1988 15 NSWLR 130 132-133.

more prominent role for good faith in the pursuit of substantive equity in the light of the *Constitution*. As has been observed elsewhere, the good faith debate is an iteration of "a problem 'as old as human trade', that is, the inevitable trade-off between commercial certainty and fairness".⁴³ The courts' reluctance to rock the boat must be viewed in the context of the effects of judgments which attempt radical law reform, as a member of the SCA, Justice Brand, has observed:⁴⁴

[T]he system of precedent or *stare decisis* ... does not lend itself to radical change. It has an inherent restraint, in that judges who take steps forward do so in the knowledge that they are not only deciding the cases before them, but that they are laying down the ground rules for deciding tomorrow's cases as well. The result is that changes by the courts are implemented incrementally — and as far as possible — within the framework of existing legal principles.

And the court has constantly had to consider, more generally, its place - and the effects of its judgments - in the greater scheme of the legal landscape in South Africa.⁴⁵

The dangers of providing judicial licence for sweeping challenges to the enforcement of contracts or contract terms based on constitutional values are well illustrated by the case brought before the SCA in *Bredenkamp*. The well-to-do applicant proceeded to court with a mixed bag of what appeared to be alternately claimed fundamental rights and constitutional values which had, allegedly, been implicated by the respondent's termination of a contract. Harms JA made short shrift of this methodology of shotgun litigation (although the learned judge also appeared to confuse the relevant rights and values in his consideration of the constitutional arguments, which is hardly conducive to clear judicial reasoning).⁴⁶ The dangers of

⁴³ Liew 2012 *Sing JLS* 417.

⁴⁴ Brand 2009 *SALJ* 72.

⁴⁵ Tanzer 2010 *Wash U Global Stud L Rev* 478 observes the following: "The question then is how post-Apartheid common law courts came to negotiate the interaction between rules, *boni mores*, and constitutional values. In doctrinal areas, such as contract law, the Supreme Court of Appeal — the highest court of appeal in non-constitutional matters — interpreted constitutional values to be fully consonant with the hegemony of common law liberty and freedom of contract. Institutionally, the Supreme Court of Appeal was concerned with circumscribing the ability of lower courts to overrule precedent under the guise of giving effect to the spirit, purports and objects of the Constitution."

⁴⁶ Although one commentator (see Rautenbach 2011 *THRHR* 510-524) believes that Harms JA's approach was calculated to avoid the majority's decision in *Barkhuizen v Napier* 2007 5 SA 323

unconstrained licence for lower courts to depart from *stare decisis* was articulated in a more specific context (namely criticism of the provincial division's approach to the application of the *Shifren* principle in the case of *Miller v Dannecker*)⁴⁷ by Brand, in the light of the aftermath of Olivier J's well-known minority judgment in *Saayman*.⁴⁸

As appears from the reported judgment in *Shifren*, the Appellate Division considered the opposing arguments raised in the ... debate and then took the policy decision that a non-variation clause should, in principle, be regarded as valid and enforceable. What the judgment in *Miller* amounted to, was a reversal of that policy decision, in direct conflict with the principle of *stare decisis*. Moreover, if the decision were to stand, the outcome of any future reliance on a *Shifren* clause would depend on the position taken by the individual judge in the policy debate. In the result, parties to litigation would have no idea whether the non-variation clause in their contract would be enforced or not.⁴⁹

The same author, when writing the majority judgment in *Potgieter v Potgieter*,⁵⁰ reiterated these sentiments:

[T]he reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge.⁵¹

Such views are in line with those expressed in the English contract law jurisdiction, one that is arguably even more conservative in respect of its treatment of good faith.⁵²

(CC) that "indirect" application (as opposed to "direct" application) of the *Constitution* is the way to go in matters of private contracts - I am, personally, not convinced that this is a correct interpretation of Harms JA's approach in *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA). Also, it should be noted that Barnard-Naudé has pointed out how the Harms JA judgment in this case deconstructs itself - see Barnard-Naudé 2011 *Stell LR* 160.

⁴⁷ *Miller v Dannecker* 2001 1 SA 928 (C).

⁴⁸ *Eerste Nasionale Bank van SA v Saayman* 1997 4 SA 302 (SCA).

⁴⁹ Brand 2009 *SALJ* 80.

⁵⁰ *Potgieter v Potgieter* 2011 ZASCA 181.

⁵¹ *Potgieter v Potgieter* 2011 ZASCA 181 para 34.

⁵² See Hawthorne 2005 *SAMLJ* 214-221. MacQueen "Good Faith in the Scots Law of Contract" 11: "A common concern is the uncertainty which would result from the introduction of a standard of uncertain content with strong moral overtones, and the damage which would be done to the commercial contracting practices which have provided the bedrock of English contract law. Traditionally its approach has been founded on the perceived bases of a market economy, emphasising the right of each party to pursue its own interests, whether in the creation or the

Bredenkamp's case, apart from the dodgy legal arguments brought by the applicant's counsel, also provides an object lesson in the dangers of subjective decision-making, which is evident when one compares the different outcomes arrived at by (the late) Jajbhay J and Lamont J, respectively, in the courts *a quo* (something that Harms JA specifically recognised when the matter came before the SCA, and which inspired him to remark on the fact that fairness is a 'slippery concept').⁵³ Brand JA, in *Potgieter*, linked the above-quoted warnings about the potential for legal uncertainty through subjective judicial decision-making to the principle of legality, which he regards (with reference to the views expressed by Harms JA in *Bredenkamp*)⁵⁴ "as part of the rule of law, which in turn constitutes a founding value in terms of s 1 of our Constitution".⁵⁵ In this way, a prime rationale for the SCA's much-criticised 'conservatism' regarding its approach to measures aimed at promoting greater substantive justice in contract law (such as good faith) is ostensibly given a constitutional imprimatur. And this creates real tensions between the transformative aspirations of the *Constitution*⁵⁶ (as, potentially, to be given substance through a device such as good faith) and more pragmatic aspects of the legal and commercial system (which tend to lean towards maintenance of the *status quo*),⁵⁷ and which may not be easy to resolve. The "classical liberal theory of contract"⁵⁸ still has many adherents in our modern day and age, and one might wonder if our appellate judges are to be counted amongst the fold of these 'anti-transformationists':⁵⁹

exercise of contractual entitlements, and to leave the other to do likewise; not at all consistent with a positive requirement of good faith, with its stress upon the need to take account of the other party's position and the regulation of abuse of right."

⁵³ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 54.

⁵⁴ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 3.

⁵⁵ *Potgieter v Potgieter* 2011 ZASCA 181 para 37.

⁵⁶ Which is one of the major grounds upon which Bhana and Pieterse 2005 *SALJ*, for example, have criticised the *Brisley v Drotzky* 2002 4 SA 1 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) judgments, as, in effect, being "counter-revolutionary" when measured against the transformative imperatives of the *Constitution*.

⁵⁷ See Botha 2001 *THRHR* 523.

⁵⁸ The conceptual and other shortcomings of which are so well explained by Bhana and Pieterse 2005 *SALJ* 866 *et seq.*

⁵⁹ Knapp 2002 *Fordham L Rev* 787.

For some, it is an article of faith that contract law has little or nothing to do with morality or fairness or even justice, to the extent that any of those terms means anything other than enforcing the agreements which one of the parties has proposed and the other party has *in form* agreed to. This faith may stem from adherence to a particular intellectual scheme of economic analysis, from a libertarian cast of mind, or simply from a sort of economic Darwinism: parties with economic power have it because they earned it, and by the same token are entitled to use it to get more.

In 2013, however, and in South Africa, many of those who currently enjoy economic power probably obtained it in a way and by means that would not have overly impressed the drafters of our Constitution. The SCA's continued institutional reluctance to upset the applecart (which Davis would undoubtedly lump under examples of "the conceptual myopia which has so limited the vision of law in South Africa for more than one hundred years")⁶⁰ - even if articulated as an attempt to avoid "palm-tree justice" and the much-vaunted eventual demise of our law of contract through the spectre of uncertainty - is questionable from at least a moral perspective.⁶¹ It is probably also assailable on the basis of logic, as "to invoke certainty, predictability and efficiency in this manner [as the court in *Brisley* did to privilege the classical theory of contract as opposed to its development in terms of the Constitution] is to elevate what are essentially the generic by-products of an emphasis on established rules of law to the status of a principal justification".⁶² One must ask if the consistent expressions of judicial conservatism in the interests of legal certainty - which serve to enforce what Barnard-Naudé criticises as the dubious hegemony of freedom (and sanctity) of contract under such classical theory of contract - may need to be urgently reassessed in the light of our constitutional order. And this conservatism is also, more fundamentally, strange when one considers the fact that it has long been recognised that all contracts in our law are *bonae fidei*, which involves good faith as a criterion in the interpretation of contracts

⁶⁰ Davis 2011 *Stell LR* 852.

⁶¹ And, quite possibly, from the perspective of logic: "The truth is that there will always be an interplay between legal rules and the values that underpin them on the one hand, and the duty of individual judges (who have their own values, life experience, and acknowledged or unacknowledged beliefs) to exercise a discretion and to treat the parties before them fairly and justly. The notion that legal rules provide absolute certainty is a fiction perpetrated by judges in order to avoid responsibility for the fact that their own values and beliefs play a role in how they interpret legal rules and how they apply those rules to a certain set of facts." See De Vos 2011 constitutionallyspeaking.co.za.

⁶² Bhana and Pieterse 2005 *SALJ* 894.

as well as in evaluation of the conduct of the parties in performance and antecedent negotiation.⁶³ It would appear that recourse to constitutional values⁶⁴ (which Lewis would probably include under the general legal principles as "those creatures that so many positivist South African judges have found ontologically mysterious and threatening")⁶⁵ may not even strictly be necessary⁶⁶ when one considers that our courts have long recognised the malignant nature of self-interested over-reaching and its implications for good faith.⁶⁷

The proposition that by our law all contracts are *bonae fidei* is not confined to matters that arise after *consensus* has been reached; it applies to the very process of reaching *consensus*. A party who adopts an ambivalent posture with a view to manipulating the situation to his own advantage when he can see more clearly where his best advantage lies has a state of mind that falls short of the requirements of *bona fides*.

One might surmise that the necessary development of the role of good faith in contract could probably be effected merely by a reconsideration of the SCA's paradoxical treatment of good faith vs. freedom of contract - which are both frequently referred to as underlying principles of our law of contract, but which have had such varied careers in this court.⁶⁸ The court's failure to recognise the central importance of good faith would appear to be at odds with the law's failure to provide an independent substantive equity defence in contract. Bhana and Pieterse observe that good faith is said to have "infused the law of contract with an equitable spirit", and that this interpretation of good faith "thus obviates engagement with the equity and fairness of a contract and so defends the lack of a substantive equitable defence in South African contract law".⁶⁹ If good faith is so under-valued, as the SCA has

⁶³ *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802A.

⁶⁴ Which I will return to in the text below.

⁶⁵ Lewis 2003 *SALJ* 331.

⁶⁶ Hawthorne seems to believe this: "Reliance on our Dutch common law could possibly provide the necessary sources for developing our law to make provision for equity in the law of contract, without coming up against a wall of opposition directed at any adjudication which involves interpretation of the so-called vague concepts contained in the Bill of Rights. In this regard it is to be deplored even more that in the landmark decision in *Bank of Lisbon & South Africa Ltd v De Ornelas & Another ...* Joubert JA held that our courts do not have an equitable jurisdiction." Hawthorne 2005 *SAMLJ* 220.

⁶⁷ *Savage & Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W) 198A-B.

⁶⁸ See Barnard-Naudé 2008 *Constitutional Court Review* 184-185.

⁶⁹ Bhana and Pieterse 2005 *SALJ* 867-868 (and 868 fn 12).

done to date, one would have expected that such an equitable defence would have been developed. It could be argued that the SCA's stance on good faith in terms of its emphasis on legal certainty may reflect a legal positivism that is "pernicious as a theory which protects entrenched interests and renders courts less than responsive to changing needs and the well-being of oppressed groups in society".⁷⁰ Hawthorne blames the current devaluation of good faith on legal positivism and judicial formalism.⁷¹ She highlights the fact that the *Constitution* demands a different approach by the courts, but also points out that this has not yet occurred to date (or, at least, that had been the case when she was writing in 2006 - indications from more recent judgments may engender a slightly greater level of optimism):⁷²

In essence the Constitution calls for a reappraisal of traditional ideas of the judicial function and of legal interpretation. It requires judges to engage in substantive legal reasoning, to articulate the values upon which their decisions are based and to engage with the social, historical and legislative context. Judges themselves are thus made subject to the demand for justification: rather than simply relying on a pre-existing rule or precedent, they are required to engage in value-based, contextual reasoning. Consequently, the new constitutional dispensation promises to initiate new developments in the law of contract. Despite rhetorical support for good faith, fairness and reasonableness, however, the post-constitutional pattern in our case law remains a succession of victories for the free marketeers. It would appear that the heritage of positivism and formalism has effectively jeopardised development of the law of contract by means of constitutional interpretation.

A foreign visitor trained in South African constitutional law but with little knowledge of our contract law jurisprudence would probably be dumbstruck by the courts' continued and apparently wholesale resistance to at least an incremental shift from legal formalism to realism and the pursuit of greater substantive equity in contract

⁷⁰ Gordon "New Developments in Legal Theory" 413, as quoted in Hawthorne 2006 *Fundamina* 75.

⁷¹ "[I]t may be argued that the lack of a doctrine of good faith in South African law of contract provides the perfect example of the effect that the Westminster system of government, positivism and the formalistic approach to contract law has had on this very important area of our law ... Formalism leans towards doctrinal conservatism. In consequence, formalists tend to avoid or limit innovations ... Positivism and formalism demand a nearly mechanical application of rules and doctrines. Phrases such as freedom of contract and sanctity of contract are used without critical reflection of their purpose or the social context within which they are to be applied. Consequently, formalism supports the application of clear general rules which require no judicial discretion ... Formalist judges believe that it is not their function to make contracts, but only to apply rules. The definitive question when a case comes up on appeal is not whether the trial judge obtained the correct result, but whether the correct rules were applied." Hawthorne 2006 *Fundamina* 75-79.

⁷² Hawthorne 2006 *Fundamina* 84.

law. He or she would, more particularly, probably be puzzled by the SCA's unabashed view that "neither the Constitution nor the value system it embodies gives the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness, or to determine their enforceability on the basis of imprecise notions of good faith" (as it was expressed in *Brisley*).⁷³ Would that sentiment apply to judges properly schooled and grounded in those constitutional values and alive to the importance of progressive judgments centred in equitable outcomes as a necessary building block for a legal system that is alive to its constitutional (supremacy) bedrock? In this regard the following observation by Ngcobo J in *Barkhuizen* would to my mind appear to point to the non-negotiable constitutional imperative for a change in approach, which deliberately shies away from blind adherence to legal certainty in favour of the promotion of greater contractual justice:⁷⁴

[W]hile public policy endorses the freedom of contract, it nevertheless recognises the need to do simple justice between the contracting parties. To hold that a court would be powerless in these circumstances would be to suggest that the hands of justice can be tied; in my view the hands of justice can never be tied under our constitutional order.

Bhana and Pieterse criticised the *Brisley* and *Afrox* judgments as "puzzling and disappointing" in respect of the ways in which good faith (as a mechanism for the infusion of constitutional values into the common law of contract) had been sidelined. The authors agree with the SCA's rejection of a *direct* invocation of good faith, on the basis of the potential for uncertainty, but are of the view that the court's rejection also extends to *indirect* invocation of good faith (so that courts may not incrementally develop rules of the common law where they do not conform to the requirements of good faith). Bhana and Pieterse support such an indirect role for good faith.⁷⁵ I would argue, however, that such tensions between the transformative aspirations of the Constitution and of the pragmatic requirements of legal certainty should manifest in this specific context only if the application of the suggested more robust conception of good faith indeed involved subjective and "wishy-washy"

⁷³ *Brisley v Drotsky* 2002 4 SA 1 (SCA) 35E-C.

⁷⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 73.

⁷⁵ Bhana and Pieterse 2005 *SALJ* 892.

decision-making by our courts. I am not convinced that this necessarily has to be the case, as I will explain below. I am not convinced that direct recourse to good faith by the courts (in the meaning attributed to this concept by Bhana and Pieterse) is necessarily evil, and I believe that much will depend on the meaning that we attribute to good faith and the content of the more value-based or normative considerations included under the term. More will be said on this below.

3 The Constitutional Court and good faith in contracting

As said earlier, many observers who have been calling for a more prominent role for good faith in the pursuit of greater substantive equity in contract law had hoped that the Constitutional Court might bring a change in the conservative approach evidenced in the SCA judgments referred to above. This hope has to date not been realised, although it appears that the CC may have provided indications that it will in future, when an appropriate case presents itself, probably be willing to revisit the common law role of good faith.

The court's refusal in *Crown Restaurant*⁷⁶ to consider arguments regarding the re-development (or "exhumation") of the *exceptio doli generalis* (on the basis that such arguments had been brought before the court as both court of first and last instance), did not augur well for the future of good faith arguments before the CC. Barnard-Naudé - who criticises the court's unwillingness to *mero motu* develop the common law in terms of section 39(2) of the Bill of Rights, as it had done in *Carmichelle's*⁷⁷ case - is of the view that the CC in this matter "made a policy decision to deal with this case by not dealing with it"; he believes that the court's lack of judicial activism might be attributable to the apprehensive way in which the *exceptio doli* (and good faith, more generally) has been treated in the common law of contract, and that the court's refusal to develop the common law in *Crown Restaurant* 'might well have amounted to a silent endorsement of the hegemonic

⁷⁶ *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 4 SA 16 (CC).

⁷⁷ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

order(ing) in our law of contract' which favours freedom (and sanctity) of contract over the pursuit of substantive equity.⁷⁸

In the light of these less than promising indications regarding the CC's willingness to revisit the law relating to good faith in contracts, it is probably not surprising that good faith was not raised as a prominent prong of the applicant's case before this court in *Barkhuizen v Napier*. Good faith was, possibly strangely,⁷⁹ relied on rather obliquely in respect of the applicant's argument that enforcement of a time limitation clause in a contract would be contrary to the implied duty of good faith where such enforcement would be unjust towards the applicant (this after the court briefly considered the application of the maxim *lex non cogit ad impossibilia* to time bar provisions where compliance with such provisions is impossible). Ngcobo J, writing for the majority of the court, started out rather unpromisingly by stating that "the requirement of good faith is not unknown to our common law of contract".⁸⁰ After a brief exposition of the role of good faith, however, the learned judge arrived at the following conclusion (with reference to *Brisley*):⁸¹

As the law currently stands good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance good faith is given effect to by the existing common-law rule that contractual clauses that are impossible to comply with should not be enforced. To put it differently: 'Good faith . . . has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contracts.' *Whether, under the Constitution, this limited role for good faith is appropriate and whether the maxim lex non cogit ad impossibilia alone is sufficient to give effect to the value of good faith are, fortunately, not questions that need be answered on the facts of this case and I refrain from doing so.* [My emphasis]

Barnard-Naudé argues - and I agree - that the CC in *Barkhuizen* clearly left open the door for development of the role of good faith in our common law of contract. The author views the approach followed by Ngcobo J as one that recognises that good

⁷⁸ Barnard-Naudé 2008 *Constitutional Court Review* 193.

⁷⁹ As Hawthorne observes, *Barkhuizen* may have been tailor-made for the development of the role of good faith in order to provide greater substantive justice in contract, as it involved an insurance contract which is subject to the open norm of utmost good faith - Hawthorne 2010 *SAPL* 92.

⁸⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 80.

⁸¹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82.

faith, in fact, is part of public policy, and that this much less controversial mechanism provides a portal for the development of a much more robust notion of good faith in line with the Constitution's transformative aspirations:⁸²

[T]he Court [in *Barkhuizen*] attributes exactly the same meaning to public policy as the meanings that have been attributed to good faith. A striking example is the similarity between the definition by the Constitutional Court of public policy as 'importing the notions of fairness, justice and reasonableness' and Olivier JA's definition of good faith as realising the community's legal convictions regarding propriety, reasonableness and fairness ... On my reading it seems then at least probable that the court would have been willing to consider good faith (in the context of its formulated public policy test) had reasons been advanced for noncompliance with the term. In this way the court seems to both accept and reject the category distinction that MacQueen and Cockrell make between public policy and good faith. The Court clearly views good faith as the measure that would curb the enforcement of the term if enforcement would be unfair or unjust to the applicant. Given the Court's statement regarding the role of unequal bargaining power in this leg of its public policy test, the suggestion seems to be that part of the good faith test will involve enquiring into the relative bargaining position of the parties and the way in which this impacted on the contractual arrangement. In this way it appears that the Court left the door wide open as regards good faith's potential role as part of the public policy test. Moreover, this means that the *exceptio doli generalis*, albeit in drag, has risen from the grave, a grave in which it was in any event never interred. Another implication of the judgment is that the Constitutional Court has confirmed that the alleged exercise of freedom of contract in violation of both the rights in and the spirit, purport and objects of the Constitution, will not be enforced on grounds of public policy ... [B]y leaving the door of public policy open to good faith, the court has created the possibility that good faith may in the future again become constitutive of freedom of contract, rather than marginalised and seen as opposed to it. Again, everything here depends on the content that will be afforded to good faith. It goes without saying that it is always possible (and indeed likely) that good faith can be afforded weak content that would just further legitimise the hegemonic understanding of freedom of contract. To put it perhaps more dramatically, it is of course always an imminent danger that good faith will simply become a private and privatising device. For this reason it becomes necessary to defend a progressive and transformative version of good faith.

The promise for a future revisiting of the proper role of good faith in contract law as evident from the above observations in *Barkhuizen* subsequently materialised in the case of *Everfresh Market Virginia v Shoprite Checkers*,⁸³ although the CC in this matter also failed to definitively tackle the issue (and was ultimately not called upon to do so in light of the applicant's case as earlier brought before the High Court and

⁸² Barnard-Naudé 2008 *Constitutional Court Review* 199-201.

⁸³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).

Supreme Court of Appeal in the matter). But the indications of the court's probable future approach to the issue - should an appropriate case present to develop the law - are clearly evidenced in the judgments of two members of the court (one of whom has, sadly, since retired). Everfresh challenged ejectment proceedings under a commercial lease agreement relating to premises in a shopping centre, whereby Shoprite (as lessor) had refused to negotiate the renewal of the lease in terms of a provision in such agreement which provided for renewal of the lease on notice by the lessee upon a rental amount to be agreed between the parties.⁸⁴ In the CC, Everfresh limited its argument to Shoprite's claimed obligation to make a *bona fide* attempt to agree, contending that the terms of the agreement precluded Shoprite from frustrating Everfresh's qualified right to renew by refusing to negotiate in good faith and that its right to renewal would fall away only if the negotiations in good faith did not result in an agreement.⁸⁵ Yacoob J summarised the parties' respective contentions as follows:⁸⁶

Everfresh contends that the common law should be developed in terms of the Constitution to oblige parties who undertake to negotiate with each other to do so reasonably and in good faith. The contention of Shoprite is that a provision of this kind should not be enforceable because the concept of good faith is too vague.

The learned judge, writing the minority judgment of the court, then continued to express the following views on good faith:⁸⁷

⁸⁴ Clause 3 of the lease agreement provided as follows: "Provided that the Lessee has faithfully and timeously fulfilled and performed all its obligations under and in terms of this Lease, the Lessee shall have the right to renew same for a further period of four years and eleven months commencing on 1st April 2009, such renewal to be upon the same terms and conditions as in this Lease contained save that there shall be no further right of renewal, and save that the rentals for the renewal period shall be agreed upon between the Lessor and the Lessee at the time. The said right of renewal is subject to the Lessee giving written notice to the Lessor of its intention so to renew, which notice shall reach the Lessor not less than six (6) calendar months prior to the date of termination of this Lease. In the event of no such notice being received by the Lessor, or in the event of notice being duly received but the Parties failing to reach agreement in regard to the rentals for the renewal period at least three (3) calendar months prior to the date of termination of this Lease, then in either event this right of renewal shall be null and void." [As reproduced at *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 3].

⁸⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 9.

⁸⁶ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 22.

⁸⁷ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 22.

Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.

What makes Yacoob J's observations on good faith in contracting especially important is the express positioning of good faith under the value system of *ubuntu*, which the judge explained as follows:⁸⁸

The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone. It may be said that a contract of lease between two business entities with limited liability does not implicate questions of ubuntu. This is, in my view, too narrow an approach. It is evident that contractual terms to negotiate are not entered into only between companies with limited liability. They are often entered into between individuals and often between poor, vulnerable people on one hand and powerful, well-resourced companies on the other. The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates ubuntu.

These observations were *obiter dicta*, as the majority of the court ultimately held that *Everfresh's* arguments and calls for the common law of contract to be developed in terms of section 39(2) of the Bill of Rights should not have been raised for the first time in the CC, and leave to appeal the SCA's rejection of *Everfresh's* challenge was denied. Even so, Yacoob J hinted at the fact that development of the common law role of good faith as per *Everfresh's* contentions were probably more in line with the spirit, purport and objects of the Bill of Rights than an approach that

⁸⁸ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 23-24.

would not require negotiation in good faith under a clause of the nature of the one contained in the lease agreement at issue in this matter.⁸⁹

Moseneke J, writing the majority opinion of the court, also chose to express himself quite forcefully regarding the potential application of *ubuntu* and the role of good faith under the common law:⁹⁰

Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of *ubuntu*, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of *ubuntu*. It emphasises the communal nature of society and carries in it the ideas of humaneness, social justice and fairness, and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity. Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of *ubuntu*, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith. I however conclude that it is unnecessary to decide the merits of any of these difficult questions now.

Even though the above observations were made in the context of one specific aspect of the application of good faith in contracting, namely the duty to negotiate in good faith in the context of such a contractual undertaking to negotiate (or "agreement to agree"),⁹¹ I would suggest that the sweeping nature of the above statements -

⁸⁹ "The proposition that a common law contract principle that provides meaningful parameters to render an agreement to negotiate in good faith enforceable is decidedly more consistent with section 39(2) than a regime that does not. A common law principle that renders an obligation to negotiate enforceable cannot be said to be inconsistent with the sanctity of contract and the important moral denominator of good faith. Indeed, the enforceability of a principle of this kind accords with and is an important component of the process of the development of a new constitutional contractual order. It cannot be doubted that a requirement that allows a party to a contract to ignore detailed provisions of a contract as though they had never been written is less consistent with these contractual precepts: precepts that are in harmony with the spirit, purport and objects of the Constitution." [*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 36].

⁹⁰ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 73-74.

⁹¹ Which remain controversial in our law of contract; see also, for example, *Indwe Aviation v Petroleum Oil and Gas Corporation of South Africa* 2012 JDR 0824 (WCC).

especially in respect of their references to *ubuntu*⁹² - augur a potentially more comprehensive future judicial review of good faith by this court. *Everfresh* now stands as a clear indication that, firstly, the CC is prepared to tackle⁹³ the proper role of good faith in contracts (especially under the value system of *ubuntu*) and, secondly, that the court appears to be of the opinion that the current role of good faith as expressed so consistently by the SCA in the cases referred to earlier probably needs to be revisited in favour of a more robust role for this principle than has hitherto been recognised. The previously quoted Jaco Barnard-Naudé also appears to view *Everfresh* as an important barometer in respect of what we can expect from the CC in future.⁹⁴

One specific component of good faith that is especially important here is that of fairness and "simple justice" between contracting parties. Even though Harms JA, in *Bredenkamp*, expressly denied the existence of an overarching constitutional value of fairness,⁹⁵ I believe that the views expressed in *Everfresh* are in accord with an emerging approach which emphasises fairness and the pursuit of contractual justice,

⁹² Hawthorne sees in *ubuntu* a mechanism for the infusion and promotion of a culture of co-operation in our contract law (which, I would suggest, would be in line with the courts' recognition of an ethical standard of good faith based in *ubuntu*, and which would demand mutual respect for the interests and expectations of contracting parties): "[I]n the South African legal context within which the law of contract operates, development and change can be brought about. The recognition of ubuntu or solidarity as the underlying constitutional value capable of harmonising freedom and equality, can pave the way for the introduction of a principle of solidarity, in which solidarity is the means by which to link modern corrective intervention with the classical ideal of freedom of contract. Not only does solidarity justify the protection of weaker parties, it also provides for a duty to co-operate." Hawthorne 2010 *SAPL* 90.

⁹³ Although it is possible that Moseneke J's observations in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) paras 64, 73 (eg "we are deprived of the views of the High Court and the Supreme Court of Appeal in matters where their expertise would be helpful") might be interpreted as an indication that the Constitutional Court is wary of directly developing a substantive good faith requirement in the common law of contract without the Supreme Court of Appeal's input on the issue. Only time will tell.

⁹⁴ He remarked as follows regarding the implications of the *Everfresh* judgment: "The approach of both [the Yacoob J and Moseneke J] judgments to the law of contract is, to say the least, at odds with our existing jurisprudence on the role of good faith in the law of contract. One of the Supreme Court of Appeal's favourite mantras is that good faith plays a marginal and indirect role in our law of contract — it is not a free-floating standard to be employed by judges to adjudicate contract-law disputes. It is a pity that this case was not properly pleaded, since it had the potential of bringing more clarity to the question whether the marginal role of good faith in contract, as espoused by the Supreme Court of Appeal in a long line of cases, is constitutionally appropriate. Judging by the remarks of the Constitutional Court quoted above, the answer to this question appears to be in the negative." Barnard-Naudé 2011 www.thoughtleader.co.za.

⁹⁵ See also *Nyandeni Local Municipality v MEC for Local Government and Traditional Affairs* 2010 4 SA 261 (ECM).

and which is evident from recent judgments in the provincial courts⁹⁶ as well as, more specifically, in the infusion of fairness into consumer contracts by means of the *Consumer Protection Act* of 2008. I believe that our contract law jurisprudence in the next decade will be quite different from the jurisprudence on good faith that has emanated from the SCA in our constitutional dispensation to date. The SCA has a constitutional duty in terms of section 39(2) to actively develop the common law in this regard, and the statement by Brand JA in *Potgieter v Potgieter* – "Unless and until the Constitutional Court holds otherwise, the law is therefore as stated by this court, for example, in the cases of *South African Forestry*, *Brisley*, *Bredenkamp*, and *Maphango* which do not support the [proposition that courts can refuse to give effect to the implementation of contractual provisions which it regards as unreasonable and unfair]"⁹⁷ – is inaccurate, overly-conservative and constitutionally unsound. Naudé reminds us: "As constitutional values have the highest authority in our law, one cannot relegate policy arguments based on constitutional values to second-rate arguments, which rank somewhere below generally recognised underlying principles of contract law".⁹⁸ Which Davis, it would appear, believes the courts have done to date, when he observes that the record shows that "the courts either eschewed the significance of the Constitution or simply nodded in the direction of the Constitution, before proceeding in the opposite direction".⁹⁹ While the majority of the SCA had warned in *Brisley* that courts cannot seek shelter in the shadow of the *Constitution* in order to attack and overthrow established principles of the common law,¹⁰⁰ I would suggest that this same court can likewise not seek shelter in the established rules of the common law to avoid constitutional development of our law of contract by delegating such duty to the CC.¹⁰¹ At the very

⁹⁶ See, for example, *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD); *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ).

⁹⁷ *Potgieter v Potgieter* 2011 ZASCA 181 para 34.

⁹⁸ Naudé 2003 *SALJ* 834.

⁹⁹ Davis 2011 *Stell LR* 846.

¹⁰⁰ *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 24. Hawthorne find this to be a very unsatisfactory approach: "This total negation of the introduction of a new constitutional model and its effect on the totality of South African law is perhaps more disturbing than the rejection of good faith as a constructive factor in the South African law of contract." Hawthorne 2003 *SAMLJ* 276-277.

¹⁰¹ As already stated, s 39(2) of the Bill of Rights demands development of the common law in the spirit of the *Constitution* where this is required. This section provides an important - and some will say indispensable - mechanism to address the problems experienced by a doctrine-based field of law in the midst of an arguable social imperative for greater substantive justice. In this

least this would not be fair towards litigants who may end up in the SCA but be unable, for whatever reason, to take judgments of this court on appeal to the CC. It is undoubtedly illegitimate for the SCA to say that "it will only change its rigid and seemingly anti-transformative approach to our common law if it is forced to do so by those rogue judges of the Constitutional Court".¹⁰²

4 A proposed understanding of good faith which may serve to promote greater substantive equity in contracting - without the hangover

The *Constitution* and the value system which it embraces came into being in the light of the realisation of the urgent need to change the *status quo* of our highly racialised and inequitable society, and to develop the law in its various branches in the image of an ideal and aspirational new South African society. As such, and in the light of the supremacy of the *Constitution*, its transformative role in the development of legal rules and doctrines is and should be the norm. So why have the courts, when called upon to develop the common law of contract, been so hesitant to deliver on their constitutional mandate?¹⁰³ When our courts throw the spectre of legal uncertainty in the face of claims for a greater role for (the direct invocation of) good faith in contractual disputes, their reasoning is to an extent understandable in the light of the sanctity of contract and the underpinnings of the will theory. Making the enforcement of contracts dependent on an external standard of review which is

regard I cannot disagree with the views of Eisenberg 2000 *CLR* 1746, which sum up so well the problem with the SCA's conservatism in developing a greater role for good faith in contracting as discussed in the text above: "Because of institutional constraints, any given body of law at any given moment of time may not have the best content it should have over the long run. For example, one of the constraints on courts is that they must attend to the interest of doctrinal stability, especially, although not exclusively, because courts act retrospectively. As a result of this constraint, the courts may for periods of time follow rules that are not the rules that would be best if the interest of doctrinal stability were put to one side. Similarly, and to the same effect, courts are not institutionally free to consider all relevant and meritorious social propositions, but instead are normally confined to those social propositions that have substantial social support."

¹⁰² In the words of De Vos 2011 www.constitutionallyspeaking.co.za. See also Eisenberg 2000 *CLR* 52-53, who observes that the duty to develop the common law "cannot be avoided, nor can it be passed from one court to the other, as the SCA sought to do in *Potgieter*".

¹⁰³ As Bhana and Pieterse observe, the approach to the development of the common law as advocated in *Carmichele* should demand the development of the common law of contract in the spirit of the *Constitution*, as "the presence of value-driven concepts such as good faith, public policy and the boni mores in South African private law invite 'constitutional infusion'" - see Bhana and Pieterse 2005 *SALJ* 871.

notionally divorced from the will of the parties would, in principle, be potentially destructive of the required legal certainty which flows from the law's hegemonic treatment of the parties' intentions. But this should be true only where the parties' intentions are not potentially at odds with the constitutional value system and their aspirations for the development of our society; our ideal constitutional community.¹⁰⁴ To privilege legal certainty in cases of rogue contracting would be to pursue an outcome that is at odds with our *Constitution*. Accordingly, the courts can no longer apply their one-size-fits-all rejection of the consideration of arguments based in those constitutional values in favour of perpetuating a system of contract that allows often gross unfairness in the dealings between individuals to be screened from legal scrutiny. That is what Madala J meant when he reminded us in *Du Plessis v De Klerk*¹⁰⁵ that "[i]n its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels"; and that is why our *Constitution* expressly allows for the horizontal application of its Bill of Rights. Accordingly, the need for the development of contract law doctrines in the image of the Constitution, which would more actively and realistically pursue its objectives, would appear to be non-negotiable and uncontroversial.

In his impressive treatise calling for the development of good faith in our constitutional dispensation, Barnard-Naudé made the following observations, which I believe are an accurate reflection of the imperative (and opportunities) for law reform in the interests of greater substantive equity in contracts:¹⁰⁶

The enactment of the Constitution, the transformative hopes it disseminates and the view that its normative framework is explicitly post-liberal occasions an opportunity for a re-evaluation of and a challenge to the individualist (hegemonic) understanding of freedom of contract, its concomitant commitments and ... the tangled web it weaves in order to sustain the false consciousness on which its legitimacy turns ... [S]tatements about the law of contract as law subordinated under the new Constitution are explicit interpretations of the constitutional mandate as requiring a re-emphasis on the ethical element of contract in the furtherance of a post-liberal or positive freedom of contract. A freedom of contract that comes to

¹⁰⁴ What Barnard-Naudé refers to (with reference to the work of Drucilla Cornell) as "the aspirational community of the 'ought to be'" - Barnard-Naudé 2008 *Constitutional Court Review* 199.

¹⁰⁵ *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 163.

¹⁰⁶ Barnard-Naudé 2008 *Constitutional Court Review* 156-157, 205 and 208.

understand that conduct cannot be characterised as free when it disrespects/violates dignity, when it pretends that contract is a relation between things and not between persons, when it does not proceed according to respect for whoever is on the other side of the negotiation ... It is only once the (im)possibility of the ethical relation is explicitly *inscribed* and *described* in the South African law of contract by way of *at least* the *explicit* incorporation and exploration of good faith in the public policy/legality requirement that the best negotiation ... becomes possible. The Constitutional Court's decision in *Barkhuizen* ... allow[s] for this possibility.

In the rest of this section I will argue, firstly, that the SCA's rejection in *Brisley* of the *boni mores* as the source for a robust application of good faith in our law of contract was premature, simplistically dismissive of the real issues, and inconsistent with the Constitution. I will then argue for an understanding of good faith as an objectively verifiable, ethical standard of conduct in contracting that is rooted in our constitutional value system, which understanding - if applied consistently by our courts on the basis of proper guidelines - would avoid the dangers of uncertainty that hitherto has been ascribed to good faith in this context.

4.1 *The boni mores as the source of a robust doctrine of good faith in contract law*

Mention was made earlier of the fact that the SCA, in *Brisley*, made short shrift of Davis J's¹⁰⁷ calls for the *boni mores* to feature in the law of contract. The court in *Brisley* was contemptuous of such arguments and rubbished them in six short sentences in the majority judgment. The court held that there are "material policy differences"¹⁰⁸ in the approaches to the law of contract and the law of delict,

¹⁰⁷ In *Mort v Henry Shields-Chiat* 2001 1 SA 404 (C).

¹⁰⁸ As per the majority at *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 21: "Daar bestaan wesenlike beleidsverskille in die benadering tot kontrakte en dié wat op delikte van toepassing is. In eersgenoemde geval reël die partye hulle regsverhouding vrywilliglik en ag hulle hulself gebonde aan hulle wilsuiting. Hulle bepaal die aard en omvang van hulle regsverhouding. In die geval van delikte het die partye geen seggenskap in die skep van hulle regsverhouding nie en bepaal die gemeenskapsoortuiging of 'n regsverhouding moet bestaan en wat die inhoud daarvan moet wees. Indien hierdie beslissings ongekwalifiseerd aanvaar word, sal dit 'n toestand van onaanvaarbare wanorde en onsekerheid in ons kontraktereg skep." ["There exist material policy differences in the approaches to contracts and to delict, respectively. In the case of the former the parties voluntarily arrange their legal relationship and deem themselves bound by the expressions of their intentions. They determine the nature and scope of their legal relationship. In the case of delicts the parties have no say in the creation of their legal relationship, and the legal convictions of the community determine whether a legal relationship must exist and what

respectively. It appears that the court's strongly-worded admonition on the danger of "unacceptable chaos and uncertainty" creeping in through such legal convictions of the community as determinant of the enforceability of a contract was based on the court's predilection for the intention of the parties rather than for the application of an externally-imposed, value-based benchmark of contractual liability. The court specifically observed that in the law of contract the parties voluntarily undertake their legal obligations and deem themselves to be bound to the expressions of their intentions, and that *the parties determine the nature and scope of their legal relationship*. But this is surely not the whole story. The parties to a contract cannot determine the nature and scope of their legal relationship to be something that is not countenanced by the law. The court appeared to overstate the role of the parties' intention in determining the nature and scope of their relationship; by observing that in the law of delict the parties have *no* say in this regard, the court seemed to place an undue weight on the parties' intentions in contract law because they have *some* say in this process. An interpretation that accords the parties to a contract *carte blanche* to determine their obligations without regard for the legal convictions of the community would be anathema to the rule of law and to the continued legitimacy of our law of contract.

And the genuine nature of the intention of the parties to a contract (and true volition), nowadays, is something that is in itself often fraught with uncertainty, and with the potential for significant inequity. Sachs J, in his eloquent and well-reasoned minority judgment in *Barkhuizen*, convincingly exposed the many problematic aspects of contracts of adhesion concluded in standard form and with little or no negotiation, in situations of significant disparity in bargaining power between the participants in modern commerce, and Bhana and Pieterse have rightly questioned the veracity of the assumptions that underlie the classical, liberal theory of contract in the light of the modern-day realities of the marketplace.¹⁰⁹ This hegemony of the will theory and of *pacta sunt servanda* based on what the parties intended and what

its content should be. If these judgments were to be accepted, unqualified, it would create a situation of unacceptable chaos and uncertainty in our law of contract." *Author's own translation from the Afrikaans*].

¹⁰⁹ Bhana and Pieterse 2005 *SALJ*.

they are entitled to expect of their bargain would seem to be questionable in many practical situations. It is especially when we are confronted with our socio-economic reality (including issues such as widespread poverty, illiteracy, unemployment, virtual monopolies in service provision and the like) that one must ask if some form of "social control over private volition"¹¹⁰ should not be a *sine qua non* for the very (continued) legitimacy of our law of contract. And, in this sense, I must ask if the *boni mores* are, in fact, such an unsuitable mechanism for this purpose as has been suggested by the SCA.

Our law has for some years now been relatively settled on the issue that contracts that offend public policy are illegal and should not be enforced by the courts. And these same courts have consistently held that public policy is now informed by the values iterated in our constitution. This was confirmed even by Cameron J in *Brisley*. Ngcobo J in *Barkhuizen*, too, told us that public policy is based on the legal convictions of the community, which are based on these constitutional values.¹¹¹ Barnard-Naudé points to the fact that there may be little difference between the views expressed by Davis J in *Mort* regarding the role of the legal convictions of the community in the context of good faith, and the views of Ngcobo J regarding the legal convictions of the community in the context of public policy:¹¹²

The only disagreement between the Constitutional Court and Davis J is the doctrinal name of these legal convictions. The Constitutional Court calls it public policy, Davis

¹¹⁰ In the words of the SA Law Reform Commission (in its report on its Project 47 on proposals for the promulgation of general unfair contract terms legislation - SALRC 1998 www.justice.gov.za), as quoted by Sachs J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 170.

¹¹¹ The majority's judgment in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28-29: "Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'. What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."

¹¹² Barnard-Naudé 2008 *Constitutional Court Review* 199-200.

J calls it good faith. Can it be that the Constitutional Court in this case in fact merged public policy with good faith? Can it be that good faith after all forms part of public policy as Olivier JA argued in his much-maligned judgment in *Eerste Nasionale Bank*? The answer to this question is by no means clear given Ngcobo J's emphatic statement that the facts of the case did not require the Court to answer the question whether, under the Constitution, the limited role for good faith expounded since *Brisley*, is appropriate. Yet, the Court attributes exactly the same meaning to public policy as the meanings that have been attributed to good faith. A striking example is the similarity between the definition by the Constitutional Court of public policy as "importing the notions of fairness, justice and reasonableness" and Olivier JA's definition of good faith as realising the community's legal convictions regarding propriety, reasonableness and fairness.

Hutchison also observed that Olivier J's approach in his minority opinion in *Saayman* encompassed a similar view on the link between good faith and public policy:¹¹³

There is a close link ... between the concepts of good faith, public policy and the public interest in contracting. This is because the function of good faith has always been to give expression in the law of contract to the community's sense of what is fair, just and reasonable. The principle of good faith is thus an aspect of the wider notion of public policy, and the reason why the courts invoke and apply the principle is because the public interest so demands. Good faith accordingly has a dynamic role to play in ensuring that the law remains sensitive to and in tune with the views of the community.

I will not engage with Barnard-Naudé's argument that good faith, in the view of the majority in *Barkhuizen*, is part and parcel of public policy, although I believe there is merit in the suggestion and that it is a less revolutionary concept than it might appear to be at first glance.¹¹⁴ At the very least I would agree, however, that Ngcobo J and Olivier J (and Davis J) appear to be *ad idem* in their conception of the legal convictions of the community as imposing a standard of fairness and

¹¹³ Hutchison 2001 *SALJ* 742.

¹¹⁴ Especially if one considers that this conception of the interplay between good faith, the *boni mores* and public policy had already been mooted at the time of the demise of the *exceptio doli generalis*, when Jansen JA had the following to say in his minority judgment in *Bank of Lisbon and SA Ltd v De Ornelas* 1988 3 SA 580 (A) 617G-H: "The *exceptio doli generalis* constitutes a substantive defence, based on the sense of justice of the community. As such it is closely related to the defences based on public policy (interest) or *boni mores* ... Conceivably they may overlap: to enforce a grossly unreasonable contract may in the appropriate circumstances be considered as against public policy or *boni mores*." In respect of this dictum, Brand 2009 *SALJ* 74 observes that "[s]omewhat paradoxically, the seed of an idea to use an alternative concept, namely that of public policy, as a doctrinal gateway for the introduction of fairness and good faith into our contract law, was planted at the funeral of the *exceptio doli*".

reasonableness on contracting parties in the light of the constitutional values.¹¹⁵ And the views expressed in *Everfresh* would appear to significantly bolster this argument in respect of the specific convictions of the community under the communalistic value system of *ubuntu* - especially if one considers the meaning attributed to *ubuntu* by Langa J in *Makwanyane*.¹¹⁶

The concept (of *ubuntu*) is of some relevance to the values we need to uphold. It is a culture that places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

It is to my mind inconceivable that our community would not be deemed to aspire to a fairer system of contract law in which mutual respect and mutual responsibility towards the other would be paramount.¹¹⁷ And in this sense I believe that good faith, in terms of the legal convictions of the community as embodied in the constitutional values and *ubuntu* provides for an ethical standard in contracting, which is at odds with the SCA's understanding of good faith to date. The emphasis should not be, simplistically, on fairness in the circumstances of any given case (and the potential for legal uncertainty which may, justifiably, arise when this

¹¹⁵ And consider what Ngcobo J said in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 51: "Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account simple justice between individuals. Public policy is informed by the concept of *ubuntu*." Bhana and Pieterse also refer to the interlinking of good faith and public policy: "[T]he significance of the normative value of good faith in relation to public policy as it features in the doctrine of legality became more prominent [following the demise of the *exceptio doli* in the *Bank of Lisbon* case]. In *Sasfin (Pty) Ltd v Beukes* the Appellate Division introduced the doctrine of unconscionability in terms of which a contract that was so unfair as to be unconscionable (i.e. exploitative of a contracting party) would be contrary to public policy and therefore invalid. This doctrine provided a potential avenue for a substantive equitable defence in its assertion that, while public policy generally occupies itself with the principle of sanctity of contract, it also needs to take proper account of the need for justice." Bhana and Pieterse 2005 *SALJ* 891.

¹¹⁶ *S v Makwanyane* 1995 6 BCLR 665 (CC) para 224.

¹¹⁷ As Bhana and Pieterse observe: "When it comes to the *content* of good faith, the classical liberalist interpretation is but one dimension of this multi-faceted value. While the precise content of the concept of good faith is far from certain, it would, at its most basic level, require contracting parties to act honestly and show a minimal level of respect for the interests that the other party seeks to advance through the contract." Bhana and Pieterse 2005 *SALJ* 890.

determination is dependent on individual judges' conception of fairness). The emphasis should be on an objectively verifiable ethical standard of conduct in contracting - 'fair dealing', which entails more than simply a subjective determination of fairness of the bargain for one or more of the contracting parties.¹¹⁸

Ultimately, the law's abhorrence of an illegitimate degree of promotion of self-interest which violates an objectively verifiable, ethical standard of good faith would not be based, simplistically, merely in such a subjective determination of what is 'fair', but rather in the fact that the public interest requires that such contracts (or conduct in their enforcement) should not be countenanced. Hutchison's frequently recycled view, that has found such favour with the SCA, reminds us that good faith is "an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract", and which has "a creative, a controlling and a *legitimizing* or explanatory function" [my emphasis]. This legitimating function of good faith is not found only in its role as an "important moral denominator".¹¹⁹ I would suggest that we should not forget the importance of those "community standards of decency and fairness" which underlie our law of contract, and the fact that they serve to legitimate the role of contract law in the broader process of the engineering of our socio-economic landscape. When Davis refers to the work of American lawyer and economist Robert Lee Hale, he emphasises the fact that the legal machinery as personified in the rules of contract that our courts apply have a key role in determining this socio-economic reality and the way in which it deals with private power and the distribution of wealth:¹²⁰

[Hale] highlights the critical impact of background legal rules on the distribution of income and wealth, which in turn is continuously fashioned by legal rules. A party who enjoys the protection afforded by a property right can exert considerable pressure in order to induce another party to enter into a bargain. In addition, the law endows the property owner with power

¹¹⁸ I will examine this concept in more detail in s 4.2 in the text below.

¹¹⁹ As per Yacoob J in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 36.

¹²⁰ Davis 2011 *Stell LR* 849, referring to Hale 1923 *Political Science Quarterly* 470.

to have recourse to governmental authority, if necessary, to enforce his or her property rights.

Our system of contract law, in effect, places in the hands of the economically powerful in society a potential weapon of mass destruction. It is inconceivable that the community's sense of what is acceptable - which legitimates the content of the legal machinery of the state which is brought to bear on the dealings between contracting parties and determines which party will receive the assistance of the state - should not play a fundamental role in determining which contracts (and conduct in the negotiation, conclusion and enforcement of contracts) should be allowed by the courts.¹²¹ In fact, the *Consumer Protection Act* may serve as a powerful illustration of the current legal convictions of the legislature to counter unfair dealing in such a broad spectrum of contracts entered into by consumers. And as Zimmerman observed, "unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree *as to outweigh the public interest in the sanctity of contracts*".¹²² The determination of what accords with or offends the community's standards of good faith conduct, therefore, seems to be little different from the similar over-riding of *pacta sunt servanda* in cases involving contracts or their enforcement which violate public policy - such 'contracts' are not, for legal purposes, contracts in our law, because no court should become an accessory after the fact by enforcing legal obligations which would violate the public interest (e.g. for being unconscionable, *à la Sasfin*).¹²³ In the context of the constitutional values (and, especially, *ubuntu*) this translates to Woolman's succinct observation that "[o]ne can contract only to do

¹²¹ Which makes Wallis AJ's criticism of Davis J's views in *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 2 SA 375 (C) strange, where he (in the process of expressing his controversial view on the non-applicability of the s 22 right to freedom of trade, occupation and profession to private restraints of trade) states that "reference to the influence of community on contracts is obscure as contracts are concluded by people and entities, not communities" - *Den Braven SA (Pty) Ltd v Pillay* 2008 6 SA 229 (D) para 34. Surely contracting between individuals takes place within communities and based on laws (and legal convictions) fashioned by such communities in order to both facilitate and regulate the dealings of individuals?

¹²² Zimmerman and Visser *Southern Cross* 260, as quoted by Davis J in *Mort v Henry Shields-Chiat* 2001 1 SA 404 (C) 475A-E.

¹²³ See *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) paras 38, 52; see also *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 ZASCA 45 para 16.

those things that are constitutionally permitted".¹²⁴ Or, in this same context, this equates to Cameron JA's view that "the limits of contractual sanctity lie at the borders of public policy".¹²⁵ And, in the context of the role of the ethical within contract law, Barnard (with reference to the work of Cornell) observes that "If we are going to declare that we are or want to be free (to contract), it seems to me that we should come to the realisation that we find freedom (of contract) only, as Cornell points out, in the realm of morality. Our freedom of contract is therefore an ethical freedom."¹²⁶ And I believe that this element of the suggested working of an ethical standard of good faith shows that its recognition would not be the antithesis of either *pacta sunt servanda* or the freedom of contract:¹²⁷

It is [the] positioning of good faith within the common contractual interest which addresses the fear that the introduction of good faith cannot be reconciled with the inherent entitlement of contracting parties to advance their own positions: while our counterparties are entitled to look out for themselves, they are not entitled to traduce the spirit and purpose of the bargain in order to do so.

Bearing in mind these ethical parameters of contractual autonomy based on the *boni mores* should also cause us to reconsider Harms DP's reliance in *Bredenkamp* on the rule of law to counter (admittedly, in that case, weak) arguments based on fairness and calls for substantive equity. The rule of law, as a constitutional value and an age-old *gründnorm* in our law, does not encompass the enforcement of that which should not be enforceable as contracts under our law, namely those 'contracts' which offend against the legal convictions of the community. Such an understanding, in fact, would violate the rule of law. The imperative to inform our understanding of good faith as one deriving from the constitutional values (and *ubuntu*) and the transformative ethos of the *Constitution* is also buttressed by the policy considerations which (should) underlie all law. As Naudé puts it:¹²⁸

¹²⁴ Woolman 2008 *SALJ* 23.

¹²⁵ Cameron JA in *Brisley v Drotosky* 2002 4 SA 1 SCA 35B-C.

¹²⁶ Barnard 2005 *SAJHR* 288-289.

¹²⁷ Liew 2012 *Sing JLS* 422.

¹²⁸ Naudé 2003 *SALJ* 827-828. Davis 2011 *Stell LR* 863 adds that value-based adjudication by the courts is, in any event, unavoidable: "Contest is inevitable in any process of adjudication, whether the dispute is grounded in the principles of the general law of contract or derived from the provisions of the Consumer Protection Act, even buttressed by the Regulations. In either

'Fairness' entails not only fairness between the parties, but also doing justice in the eyes of the community as a whole. This requires the advancement of desirable goals of collective social welfare, including the promotion of ethical values and generally accepted underlying principles of our law ... All these determinants of fairness can be grouped together as 'policy considerations' ... In fact, all legal rules ought in the final analysis to be justifiable by reference to some consideration of policy. This is because all law, including contract law, is regulatory. When the state should put the machinery of the law in the service of the one party against the other, and how that should be done, are important questions of public policy. The application of the law (*ius dicere*) is therefore 'unavoidably embedded in political considerations'.

De Vos has also observed that a proper understanding of this underlying nature of all legal rules would seem to rubbish the SCA's consistent distinction between 'hard law' rules of contract and vague and abstract notions (such as good faith), and that this also highlights the paranoid and irrational nature of the court's stance towards the latter in respect of the maintenance of legal certainty.¹²⁹ In this light, is it really controversial to claim a basis for good faith in contract law which derives from the legal convictions of the community? Barnard-Naudé reminds us that the majority of the court in *Barkhuizen* confirmed that "the enforceability or not of contractual terms are determined by the legal convictions of the community as represented by the

case, the process of adjudication is involved in the application of open ended legal standards that require an interrogation of values and policy considerations."

¹²⁹ De Vos observes: "The problem with this line of reasoning is of course that it is based on the untenable fiction that legal rules do not have to be interpreted at all, that such rule just have an obvious and single meaning that suggests itself to a judge who never has to revert to value judgements when he or she interprets a legal rule. This view also loses sight of the blindingly obvious fact that when these legal rules are applied by judges, value judgments must inevitably be made. Different judges will not always interpret the same legal rule in the same way and neither will they apply that rule to the same set of facts in exactly the same way. As any practicing lawyer (or anyone who has read some writing by legal realists) will tell you, this kind of reasoning is not easy to square with reality. After all, often the first thing a lawyer asks when he or she has to appear in court, is who the judge is before whom he or she is going to appear. And why would anyone have been upset about the values and beliefs of our new Chief Justice if they did not think that the value of a judge played a role in adjudication — even when a judge is called upon to apply so called rigid legal rules? The notion that legal rules provide almost absolute legal certainty is an obvious fiction that cannot bear scrutiny. If rules provided such certainty, why would anyone ever approach a court and ask a court to interpret or apply a legal rule in any dispute? All parties in a legal dispute would ask their lawyers to tell them what the outcome of their case would be and the party who is told that she will lose the case will then be persuaded not to waste her money on legal bills by pursuing the case in court. However, this does not happen in real life because real human beings apply the law." De Vos 2011 www.constitutionallyspeaking.co.za.

values that underlie our constitutional democracy".¹³⁰ The court said this in the context of its discussion of the role of public policy but, as said above, the author argues, convincingly, that the court appeared to equate public policy and good faith (at least in terms of the content it ascribed to public policy). I am adding my voice here to the calls for the role of good faith in contracts to be reconsidered in line with the constitutional values. In this process it should be borne in mind that the legal convictions of the community play an integral role in such a process - the SCA has said so:¹³¹

Courts have not only the right but also the duty to develop the common law, taking into account the interests of justice and at the same time to promote the spirit, purport and objects of the Bill of Rights. In this regard courts have regard to the prevailing mores and public policy considerations.

In the current context, the legal convictions of the community are doubly important as also being the source of the ethical standard of good faith and fair dealing. And one could, I would suggest, even meet the arguments of those opponents of a robust good faith doctrine derived from the *boni mores* who may believe that such a creature would lack the possibility of empirical proof:¹³²

Admittedly, assertions that '[p]eople, including commercial people, expect a degree of common sense, fairness and justice in the law and in the rules that govern commercial behaviour' cannot be proven in any scientific sense. However, it is difficult to see how it might convincingly be argued otherwise: for people to expect nonsense, unfairness and injustice in any branch of the law is surely to stultify its purpose. This is especially so in contract law, which is concerned with agreements, understandings and other such meetings of minds. The superstructure of contract law is built upon foundational notions of accord, cooperation and common purpose, and it is suggested that those foundations are likely to be strengthened, not weakened, by adopting a doctrine of good faith.

Liew gives a further reason why fears of uncertainty inherent in a doctrine which would require case-by-case analysis of compliance with a duty of good faith might

¹³⁰ Barnard-Naudé 2008 *Constitutional Court Review* 199, with reference to Ngcobo J's views as expressed in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28-29.

¹³¹ Per Harms DP in *Van Jaarsveld v Bridges* 2010 ZASCA 76 para 3.

¹³² Liew 2012 *Sing JLS* 422.

be ungrounded - namely that similar methodology is not unknown in other areas of law (such as the law of delict):¹³³

[A] parallel may perhaps be drawn to the tort of negligence, where the existence of a duty of care is commonly regarded as a question of law that sets a precedent for analogous cases, whereas the question of whether that duty has been breached (in other words the content of the duty) is generally seen as a question of fact that depends crucially on the circumstances of each case.

In this light there may be something to be said for the approach mooted by Alkema J in *Siyepu & Others v Premier of the Eastern Cape*.¹³⁴ The learned judge drew an interesting analogy with the law of delict in comparing delict and contract law as the two primary sources of obligations (*ius obligationes*) in the South African private law. He did so in the context of an examination of the proper role for the intention to create legally enforceable obligations (*animus contrahendi*), and suggested that the lawfulness of contractual obligations should trump the parties' intention in any such investigation. There may be a case to be made for a closer relationship between these two branches of our private law in respect of the central importance attached to the lawfulness, based on the legal convictions of the community, of obligations created (also in the context of contracts). This, of course, would fly in the face of the majority's brief and rather dismissive rejection of such a link through the *boni mores* in *Brisley*, and Alkema J was at pains to point out that his approach in this case might be "at this stage of the development of our law on the subject, a bridge too far".¹³⁵ It is interesting to note, however, that such an infusion of the *boni mores* into contract law might also serve to address (or, at least, provide pause for reflection regarding the cogency of) the fears of uncertainty so emphasised by the Supreme Court of Appeal in the good faith debate, as referred to earlier, and that the law of contract might be able to learn something from the law of delict in this regard:¹³⁶

¹³³ Liew 2012 *Sing JLS* 427.

¹³⁴ *Siyepu v Premier of the Eastern Cape* 2013 2 SA 425 (ECB).

¹³⁵ *Siyepu v Premier of the Eastern Cape* 2013 2 SA 425 (ECB) para 62.

¹³⁶ Bhana and Pieterse 2005 *SALJ* 894-895.

It is in fact not uncommon in law for the policy objective of legal certainty to be relaxed in circumstances where competing social considerations and the development of the common law warrant it. In the law of delict, for example, the test for wrongfulness, which is based on the legal convictions of the community, wholeheartedly embraces competing social and economic considerations (including those reflected in the Constitution), notwithstanding the inevitable reduction in legal certainty. The law of contract, as a branch of the common law, is equally meant to embrace normative and constitutional values so as to adapt to the changing needs of the community. It is therefore difficult to discern a cogent explanation for contract law's apparent need for more certainty and its attendant 'elevated' status.

Of course, as I have argued above, I would suggest that the explanation for this elevated status of certainty in contract law is the courts' inapt over-emphasis on the intention of the parties and the protection of their expectations in terms of *pacta sunt servanda*, while failing to sufficiently emphasise the role of the legal convictions of the community in determining the parameters within which those expectations *should* be protected by law. This methodology serves to retard the development of the common law of contract towards greater substantive equity, particularly in terms of the good faith debate.

4.2 A proper understanding of the meaning of good faith (as an ethical standard of fair dealing rooted in the constitutional values)

I have argued above that the legal convictions of the community, as based in and evidenced by the constitutional values (and, especially, *ubuntu*) provide the basis for a more robust doctrine of good faith in our law of contract. I am not arguing for a vague and imprecise notion of good faith which would require courts to make casuistic and subjective decisions based on a vague conception of 'fairness'. What I am proposing is that the *boni mores* and *ubuntu* require the recognition of an objectively verifiable ethical standard of conduct in contracting and the enforcement of contracts - "a minimum threshold of mutual respect".¹³⁷ In essence, I believe that

¹³⁷ As it was put by Davis J in *Mort v Henry Shields-Chiat* 2001 1 SA 404 (C) 475A-E. Barnard sees the ethical element of contract law as follows: "[T]he ethical element of contract seems to me to be no more than the requirement to act reasonably and in good faith (when one contracts). It is no more than the realisation that freedom of contract cannot prevail in the face of substantially inequitable outcomes of its application. It is the realisation that the political and moral consequences of a court's decision are inevitably going to affect people in real situations. It is

our *Constitution* requires the common law of contract to recognise and enforce a standard of fair dealing (based on good faith, as informed and derived from the constitutional values) between individuals who enter into contracts, which standard a court should be able to invoke directly in contractual disputes. A concept of fair dealing has become the norm in civil law systems¹³⁸ and indications (especially in consumer law) are that such standards are increasingly being recognised, internationally. Importantly, it should be remembered that many of those jurisdictions that have started to recognise such a standard do not have the benefit of our constitutional value system, but have still managed to make the mind-shift from rigid formalism in the enforcement of contracts to the policing of private conduct in the pursuit of substantive equity. Hector MacQueen (writing in the context of Scots law) made the following observations regarding Martijn Hesselink's¹³⁹ distinction between the subjective¹⁴⁰ and objective meanings of good faith under civil law systems (for example, in Germany):¹⁴¹

also the claim that the formalistic and clinical conclusions of the *Bank of Lisbon* decision do not mean that the Roman-Dutch law has lost the very feature which enabled it to survive in the modern world, its openness to considerations of policy. It is, to paraphrase Zimmermann, something closely related to the ethical foundations of the *ius commune*; a realisation that the concern for substantive justice is not adequately reflected in the sometimes deficient will theories which have replaced equitable doctrines." [References omitted] Barnard 2005 *SAJHR* 289-290.

¹³⁸ It is worth noting that, in the process of the SA Law Reform Commission's Project 47 on the proposal of general unfair contract terms legislation, Professors Van der Merwe and Van Huyssteen suggested a role for an objective standard of good faith which would be in line with the German position: "Professors SWJ van der Merwe and LF van Huyssteen note the proposed replacement of 'good faith' with 'unconscionability' as the basic standard for evaluating the 'fairness' of contractual terms and point out that they experience a number of difficulties with the substitution proposed in the discussion paper. They state that the concept of good faith entails, by definition, an objective standard capable of application to all phases of contract and this is said on the basis that good faith is not without more the antithesis of 'bad faith', which is generally understood in a more subjective fashion and that the absence of good faith is not automatically equal to bad faith. They consider that as such, good faith holds the potential of being developed into a general standard for equity in contract such as the *Generalklausel* of the German *BGB*, capable of interpretation and application by the courts. They are of the view that one should consider in this respect the existing body of jurisprudence in South Africa, including the present development regarding 'unfair contract terms' and illegality. They remark that the concept of 'unreasonableness' may certainly also be given an objective content, however, used in conjunction with 'unconscionable' and 'oppressive', it is difficult to interpret 'unreasonable' as a completely objective standard. The Professors consider that it is not clear to what extent a more subjective standard may create difficulty for the courts when asked to develop the applicable norm and especially when required to relate it to existing norms which apply value judgments to the various phases of contract, such as the grounds for rescission and illegality." SALRC 1998 www.justice.gov.za.

¹³⁹ Writing in "Good faith", in Hartkamp *Towards a European Civil Code*.

¹⁴⁰ "Subjective good faith is concerned with knowledge of facts or events, or absence of knowledge, and affects mainly property law and possession. In this sense good faith is perfectly familiar in

It is objective good faith, however, which is chiefly relevant to contract law. Objective good faith is about external, or community, norms and standards imposed upon contracting parties. Over time these norms and standards have been distilled into particular rules ... But the content of good faith is not fixed or static, and the existence of the general principle in the Codes enables the Continental judge to innovate and develop the law in response to circumstances without infringing upon the territory of the legislator.

It is, however, in that most unlikely place - the English law of contract - where I believe we may find guidance on the way forward for recognition of an objective test for good faith. In the recent judgment of *Yam Seng PTE Ltd v International Trade Corporation Ltd*,¹⁴² Leggatt J, in the Queen's Bench, commented as follows on the content of good faith, and it is submitted that these comments may hold the key to our own understanding of the concept and why it may not be as slippery and potentially risky a ground to promote greater substantive equity in contract law as might be commonly believed.¹⁴³

Although its requirements are sensitive to context, the test of good faith is objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people ... Understood in the way I have described, there is in my view nothing novel or foreign to English law in recognising an implied duty of good faith in the performance of contracts ... I see no objection, and some advantage, in describing the duty as one of good faith 'and fair dealing'. I see no objection, as *the duty does not involve the court in imposing its view of what is substantively fair on the parties. What constitutes fair dealing is defined by the contract and by those standards of conduct to which, objectively, the parties must reasonably have assumed compliance without the need to state them. The advantage of including reference to fair dealing is that it draws attention to the fact that the standard is objective and distinguishes the relevant concept of good faith from other senses in which the expression 'good faith' is used.* [My emphasis]

It should be noted that the judgment in *Yam Seng*, and especially Leggatt J's views on a duty of good faith, have not yet been confirmed in English law.¹⁴⁴ These above

English and indeed Scottish law, both of which offer substantial protection to the bona fide possessor and to the good faith purchaser of goods from a seller without title while denying it to the acquirer in bad faith." MacQueen "Good Faith in the Scots Law of Contract" 6.

¹⁴¹ MacQueen "Good Faith in the Scots Law of Contract" 7.

¹⁴² *Yam Seng PTE Ltd v International Trade Corporation Ltd* 2013 EWHC 111 (QB).

¹⁴³ *Yam Seng PTE Ltd v International Trade Corporation Ltd* 2013 EWHC 111 (QB) para 144-150.

¹⁴⁴ The Court of Appeal, in the recent judgment in *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (trading as MediRest)* 2013 EWCA Civ 200 did not express an opinion on the correctness of Leggatt J's views in *Yam Seng*. Both the majority (per Lord Justice Jackson)

sentiments seem to be very closely mirrored, however, by those expressed by the Singapore Court of Appeal in a recent judgment:¹⁴⁵

We think that the concept of good faith is reducible to a core meaning... At its core, the concept of good faith encompasses the threshold subjective requirement of acting honestly, as well as the objective requirement of *observing accepted commercial standards of fair dealing in the performance of the identified obligations*. This encompasses a duty to act fairly, having regard to the legitimate interests of the other party.

Hawthorne also iterates the objective standard of fair dealing that is inherent in the concept of good faith, with reference to the experience in civilian jurisdictions:¹⁴⁶

Good faith has both a subjective and an objective sense. The subjective sense requires honesty in fact, while the objective sense requires compliance with standards of fair dealing ... It is without question true that the result of subjective good faith would be legal uncertainty, but it is submitted that good faith in the law of contract has an objective nature. Most countries which have a civil code refer, in their law of contract, to good faith and rely on this norm ... It would be absurd to contend that the law of contract in these jurisdictions differs from judge to judge, or from party to party. It is submitted that in all these [civil law] jurisdictions, the courts have, in conjunction with legal science, developed an objective norm of good faith which governs the conduct of contracting parties. [References omitted]

If the European systems are still too far removed from us, not only geographically, historically and economically, a potentially more comparable jurisdiction to South Africa - Brazil, which also struggles with vast levels of social inequality - may provide some guidance on such an objective standard of good faith and fair dealing under a more relational conception of contract (and its 're-personalisation').¹⁴⁷

and minority (Lord Justice Beatson) referred to *Yam Seng* without expressing disapproval of that judgment.

¹⁴⁵ *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* 2012 SGCA 48 para 45 [emphasis in the original] - as quoted by Liew 2012 *Sing JLS* 419.

¹⁴⁶ Hawthorne 2005 *SAMLJ* 218-219.

¹⁴⁷ Da Silva Filho 2006 *Penn St Int'l L Rev* 431 observes the following: "The duty of good faith refers not to the abstract and fixed moment of formal contract formation in which the parties are judged as contracting agents, but rather to the unfolding time that leads to and follows contract formation as experienced in the daily lives of the parties ... The re-personalization of the law looks to recover the basis of the reciprocity and trust that underlies contract relations. In principle, the contractual promise is a giving of one's word, and there is a moral basis for enforcing the promise because the other party is entitled to count on another's promise under the *principle of fidelity*. When the *word* of the promise receives the legal provision for enforcing obedience it becomes a full contract. At this moment the expectation that the promise generates

It appears to me that it is possible to formulate an objective test for good faith conduct in contracting. Apart from the subjective notion of good faith (honesty, or the absence of bad faith), objective good faith would translate to *an ethical standard of fair dealing between parties which encompasses notions of trust, a moral basis for the enforcement of promises, reciprocity, a duty to act fairly, having regard for the legitimate interests of the other party, and to refrain from conduct that is commercially unacceptable to reasonable and honest people*. As stated earlier, I am not calling for a conception of good faith as a tool for parties to challenge the fairness of their bargain, generally. That would not be in line with established principles of our law of contract (which have been established for more than a hundred years).¹⁴⁸ Even under the *Constitution* (and, specifically, its foundational values), Ngcobo J in *Barkhuizen* reiterated the constitutional status of (contractual) autonomy and confirmed that parties are free to contract, even to their detriment.¹⁴⁹ In sporting lingo, our courts should not assist parties in cases of 'unforced errors'. Such a general power to strike down contracts in order to assist parties who are the authors of their own woes would truly violate the sanctity of contracts, as well as pose the very real risk of subjective judicial notions of fairness implicating legal certainty. Also, it might contribute to moral hazard and the risks of cultivating a society of careless contractants secure in the expectation of a judicial get-out-of-jail card. What I am proposing, however, is that, apart from the outcomes of the bargain, a party should be entitled to challenge conduct by the other party which offends against an ethical standard determined by the legal convictions of the community. Our law already provides assistance to parties in cases of improper conduct in the formation of contracts (consider the remedies relating to misrepresentation, duress and undue influence). Why should a party be without

for the other is transformed into a right, a claim enforceable by law. It is precisely here that the focus on the subjective right tends to obscure the moral roots grounded in solidarity from which the contract springs. The legal system must refuse to close down in this manner, and must embrace the contract relation as one of *autonomous solidarity*." [Emphasis in the original]

¹⁴⁸ Compare the often-quoted dictum of Innes CJ in *Burger v Central South African Railways* 1903 TS 571 at 57, where Innes CJ stated that "our law does not recognise the right of a court to release a contracting party from the consequence of an agreement duly entered into by him merely because that agreement appears unreasonable".

¹⁴⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 58: "Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity".

recourse if such conduct presents only after the conclusion of the contract (for example, in the enforcement of such a contract)? It would be illegitimate for our law to allow *pacta sunt servanda* and outdated notions of freedom of contract to be used as a vehicle to facilitate the abuse of power by unscrupulous persons; this was recognised many years ago by Jean-Baptiste Henri Lacordaire, who declared that "*entre le fort et le faible c'est la liberté qui opprime* (between the weak and the strong it is freedom that oppresses [and the law that sets free])".¹⁵⁰ This is, clearly, no novel proposition, although it is one that is currently undervalued by the SCA's approach to the role of good faith.

When Cameron J referred in *Brisley* to the fact that "[s]horn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity", one must ask what those obscene excesses are. If good faith is understood as an objectively determined ethical standard consonant with (and inclusive of) the notion of fair dealing - which is so fundamentally at the heart of *Sasfin's* "simple justice between man and man" - would the abuse of autonomy in a manner that selfishly promotes one party's self-interest contrary to the demands of such ethical standard not constitute just such an "obscene excess" of individual autonomy? Does unethical behaviour as a tool for the achievement of survival of the fittest under the "law of the jungle" - especially when this occurs amidst a relationship of severe inequality of bargaining power - accord with the precepts of *ubuntu* and the undoubtedly relational focus of our *Constitution* as a social compact (as manifested in Barnard-Naudé's "politics of friendship" in contract)?¹⁵¹ If so, *should* it? It is suggested that, just like *Sasfin's* abhorrence of clearly unconscionable contracts, it might not be such a difficult exercise to spot in any given case that a contracting party's conduct amounts to shameless self-promotion at the cost of the other party's constitutional

¹⁵⁰ As quoted by Belgian Supreme Court Justice Eric Dirix, in Dirix 2010 *TSAR* 76.

¹⁵¹ The author argues as follows regarding his vision for the role of good faith in contract law which develops under our transformative *Constitution*: "[G]ood faith as the ethical element of contract directly involves the constitutional ideal of civic friendship in the South African law of contract. Civic friendship as an aspirational ideal of the new legal order then enjoins us to transform the hegemonic order(ing) in the law of contract by way of a direct involvement of good faith. I see the starting point of this transformation as a call for the politics of friendship in the politics of contract." Barnard-Naudé 2008 *Constitutional Court Review* 158.

values.¹⁵² Walsh has observed, in the American context, that the codification in 1981 of good faith in the *Restatement (Second) of Contracts*¹⁵³ did not include a definition of good faith by the drafters. He observes, however, that instead they stated that "although the meaning of good faith is dependent upon the context in which it is used, good faith 'emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party'".¹⁵⁴ What would those justified expectations be in our law? Would *ubuntu* not require that parties to a contract should be entitled to expect a certain measure of respect from the other party, of being treated fairly and within a contractual environment free from attempts at selfish over-reaching?¹⁵⁵

'Conservative' judges may even limit the application of such direct invocation of an ethical standard of good faith deriving from the *boni mores* by following a similar approach to that advocated in *Sasfin* in respect of the public policy test - namely that only egregious contraventions of the standard of good faith would provide a contractual defence (just as, per *Sasfin*, not all unfair contracts are against public policy; just those contracts that are so extremely unfair that they are unconscionable

¹⁵² In a situation such as, for example, *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 76, where Pillay J found a bank's conduct to be unlawful for the following reasons: "Cumulatively considering the unexplained tactics the Bank employed, this action is heavy handed intimidation in response to Mr Dlamini seeking to enforce his right to rescind the agreement and claim a refund. The Bank's conduct in initiating and pursuing this action is unlawful for the further reason that it is irrational. The unlawfulness on all the grounds established above is a breach of the right to equality in s 9(1) of the Constitution. The Bank conducted this transaction oblivious of the purposes of the [National Credit Act]. Notwithstanding the manifest inequality in its relationship with its bargaining counterpart it sought to snatch an advantage." See further discussion of this case in the text below.

¹⁵³ In A 205, which provides as follows: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement".

¹⁵⁴ Walsh 2001 www.acrel.org.

¹⁵⁵ Or, as it has been put: "[S]tatements about the law of contract as law subordinated under the new Constitution are explicit interpretations of the constitutional mandate as requiring a re-emphasis on the ethical element of contract in the furtherance of a post-liberal or positive freedom of contract. A freedom of contract that comes to understand that conduct cannot be characterised as free when it disrespects/violates dignity, when it pretends that contract is a relation between things and not between persons, when it does not proceed according to respect for whoever is on the other side of the negotiation ... At the heart of contract lies the idea that I have an interest in something of yours and that you have an interest in something of mine. The hegemonic capitalist over-emphasis on the *things* and the utter neglect of the *persons* who have these things, has provided an extremely distorted version of what the word "interest" in the above formulation originally entails." Barnard-Naudé 2008 *Constitutional Court Review* 205, 207.

and thus against the public interest).¹⁵⁶ In the light of the SCA's near complete devaluation of good faith to date, I would be willing to settle at least for this, although I believe we can (and should) do better. But good faith should not be sidelined to the extent that Davis argues has been done by the courts in respect of public policy in the constitutional context: "The invocation of public policy thus becomes no more than a basis by which to employ a ritual incantation of the existence of the Constitution before moving on to deal with the "real" law of contract."¹⁵⁷

So, in order to provide a less controversial meaning for the determination of the content and parameters of such an ethical duty - and to attempt to avoid the temptation for judges to reject outright such an application of good faith - I will very briefly consider possible guidelines to facilitate the courts' application of such a standard. And here I believe we may find some food for thought in the relevant provisions of the *Consumer Protection Act*, in the suggestions by the SA Law Reform Commission in its earlier proposals for general unfair contract terms legislation,¹⁵⁸ and in the courts' jurisprudence to date. Before I engage in this exercise, however, I would suggest that we should not underestimate the quality of our judicial officers.¹⁵⁹ I believe that, even in the absence of exhaustive guidelines to the courts

¹⁵⁶ And a yardstick to determine when the line has been crossed might be whether or not the relevant conduct in breach of good faith violates the other party's constitutional values, not unlike the finding in a case of undue influence (which was probably more properly a case of economic duress) in *P Gerolomou Constructions (Pty) Limited v Van Wyk* 2010 ZAGPPHC 258 para 24.

¹⁵⁷ Davis 2011 *Stell LR* 847.

¹⁵⁸ One sometimes finds, in the literature, a conflict of opinion between proponents of unfair contract legislation and the proponents of the view that the common law is the proper forum for the pursuit of greater substantive equity in contracts. I subscribe to the views expressed by Sutherland, namely that this should not involve an "either/or" solution and that both the legislature and the courts have a role to play: "After [*Barkhuizen v Napier* 2007 (5) SA 323 (CC)] it is impossible to argue that there is not a need for [consumer legislation, specifically the Consumer Protection Act]. It accordingly may be suggested that the *Napier* case will soon be of little practical relevance. However, it is proposed that the opposite is true. It is necessary that these legislative reforms should be accommodated within a general contract law and insurance law that are in harmony with it. These fundamental statutory reforms cannot be treated as exceptions to general and traditional contract law or insurance law. The Constitution is central to the creation of such a harmony." Sutherland 2009 *Stell LR* 72.

¹⁵⁹ Which Hawthorne accuses the SCA of doing in *Brisley v Drotzky* 2002 4 SA 1 (SCA): "Why do Harms JA and his brothers have so little faith in their colleagues' ability to develop the law? To argue against judicial discretion by stating that 'die maatstaf is dan nie meer die reg nie maar die regter' ... is to hark back to a nineteenth century notion of judges as 'wetstoepassers' in codified

in applying a good faith standard of fair dealing, many cases of the violation of such a standard should be open to adjudication on the basis of common sense. As Lewis observed regarding some cases that involved creative judicial attempts to control the use of contractual exemption clauses in English law, such decisions "seem intuitively correct in that they match our commonsense perceptions of what is just. They do not seem to be manipulating the rules of contract".¹⁶⁰

It is not my intention here to even attempt to exhaustively define and populate my suggestion for an ethical standard of fair dealing based on the *boni mores* and *ubuntu*, as I believe that, if such suggestion were to find support in our courts, judges would be the best suited to developing such a standard and to undertaking such development based on the cases before them. I do think, however, that there are a number of specific elements which would have to be encompassed in such a standard for judicial consideration in any given case, and that we already find these elements either in the judgments of our courts or in the consumer legislation. The astute reader will note that these suggested factors are a bit of a mixed bag, incorporating factors relating to contract formation, mistake, public policy and the content of contracts. I believe, however, that they are all relevant to the determination of compliance (or not) with an ethical standard of conduct in contracting, which envelopes the various stages of the contract's establishment and existence (treating the contract as a lived reality rather than a snapshot of a legal bargain). So, bearing in mind that this is not intended to be the final word on the subject, I will rather simplistically submit that all of the following are elements which courts could use as guidelines in order to determine compliance with an ethical standard of good faith in any given case:

legal systems, capable only of robotic, conveyor belt style operations, rather than as the creators of law whose intellectual gymnastics and powerful interpretations have entranced generations of lawyers and scholars." Hawthorne 2003 *SAMLJ* 276.

¹⁶⁰ Lewis 2003 *SALJ* 339, with reference to the judgments in *Chapelton v Barry Urban District Council* 1940 1 KB 532 and *Olley v Marlborough Court Ltd* 1949 1 KB 532.

- *The relative bargaining power of the parties:*¹⁶¹ We find support in the case law (and elsewhere)¹⁶² for the notion that inequality of bargaining power is a factor to be taken into account in determining whether or not a contract (or a term in a contract, or its enforcement) offends public policy.¹⁶³ Of course, inequality *per se* should not be determinative, but rather the illegitimate abuse of bargaining power in any given case.¹⁶⁴ I would suggest that this would indeed be a relevant factor to consider in conjunction with the parties' conduct in any given case;¹⁶⁵

- *Whether or not prior to or at the time the contract was made its provisions were the subject of negotiation:* This is one of the guidelines for the determination of "unreasonableness, unconscionableness or oppressiveness" suggested by the SA Law Reform Commission in its earlier proposal for unfair contract terms legislation.¹⁶⁶ Included in this could be a consideration of whether or not it was reasonably practicable for the party seeking relief to negotiate for the alteration of the contract or to reject any of its provisions.¹⁶⁷ I would suggest that courts would also be able to find valuable guidance on the role, nature and consequences of contracts of adhesion in our law in the minority judgment of Sachs J in *Barkhuizen v Napier*,¹⁶⁸

¹⁶¹ With the understanding that bargaining power should be understood in the sense of "the power to obtain a preferred outcome in a transaction" - see Barnhizer 2005 *U Colo L Rev* 152.

¹⁶² This was also suggested as a factor (amongst the guidelines) to be taken into account in the determination of "unreasonableness, unconscionableness or oppressiveness" by the SA Law Reform Commission in its proposal for unfair contract terms legislation - SALRC 1998 www.justice.gov.za; suggested s 2(a) of the proposed Bill.

¹⁶³ See *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 12; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59; *Jordan v Farber* 2009 ZANHC 81.

¹⁶⁴ See Bhana and Pieterse 2005 *SALJ* 887; see also *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 5 SA 339 (SCA); Cassim 2005 *SALJ* 534.

¹⁶⁵ Bhana and Pieterse 2005 *SALJ* have suggested (with reference to the courts' approach in *Brisley* and *Afrox*) that inequality of bargaining power should not be considered in the abstract, but that proper account should be taken of "normative considerations of good faith, fairness and equality".

¹⁶⁶ SALRC 1998 www.justice.gov.za; suggested s 2(e) of the proposed Bill.

¹⁶⁷ SALRC 1998 www.justice.gov.za; suggested s 2(f) of the proposed Bill.

¹⁶⁸ See, specifically, as contained in the learned judge's views as expressed in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 146.

- *The extent to which notice was given by the one party to the other of the existence, nature, meaning and effect of a provision in the contract:* This is reflected in our common law treatment of the *caveat subscriptor* rule and the courts' approach(es)¹⁶⁹ to unexpected terms in contracts. It is also reflected in the provisions of the *Consumer Protection Act*,¹⁷⁰
- *Whether or not there is a lack of reciprocity in an otherwise reciprocal contract:* This is another of the suggested guidelines proposed by the SA Law Reform Commission,¹⁷¹ which also finds resonance in the provisions of the *Consumer Protection Act*,¹⁷² and I believe it speaks for itself; and
- *The degree to which the contract requires a party to waive rights to which he or she would otherwise be entitled:* This, another suggestion of the SA Law Reform Commission,¹⁷³ also seems to find resonance in the provisions of the *Consumer Protection Act*.¹⁷⁴

More generally, some guidance may also be found in the SA Law Reform Commission's 'catch-all' guideline, namely "the *context of the contract as a whole*", in which case the court may take into account the identity of the parties and their relative bargaining position, the circumstances in which the contract was made, the existence and course of any negotiations between the parties, any usual provisions in contracts of the kind or any other factor which in the opinion of the court should be taken into account.¹⁷⁵ Here, there would be scope for consideration of the circumstances of the parties, and I would suggest that further guidance may be found in section 40 of the *Consumer Protection Act*, where it states that "it is

¹⁶⁹ Bearing in mind that the Supreme Court of Appeal has in recent years been rather inconsistent in its approach to this issue - see Pretorius 2010 *THRHR* 497 *et seq.*

¹⁷⁰ For example, see ss 22, 48(2)(d)(ii) and 49 of the *Consumer Protection Act* 68 of 2008.

¹⁷¹ SALRC 1998 www.justice.gov.za; suggested s 2(o) of the proposed Bill.

¹⁷² See ss 48(2)(a) and (b), which provides that a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or agreement is purportedly subject, is unfair, unreasonable or unjust if "it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied" or "the terms of the transaction or agreement are so adverse to the consumer as to be inequitable".

¹⁷³ SALRC 1998 www.justice.gov.za; suggested s 2(x) of the proposed Bill.

¹⁷⁴ See, for example, ss 48(1)(c) and 49 of the *Consumer Protection Act* 68 of 2008.

¹⁷⁵ SALRC 1998 www.justice.gov.za; suggested s 2(y) of the proposed Bill.

unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor".¹⁷⁶ There would also be scope for consideration of the conduct of the respective parties in the formation and execution of the contract.¹⁷⁷

In order to provide some more concrete guidance on the application of the suggested ethical standard of good faith, I will - again briefly and rather simplistically - attempt to consider such application in a more practical sense, by examining the potential role for such a mechanism in an actual case. The Durban High Court, in *Standard Bank v Dlamini*,¹⁷⁸ recently considered a matter that I believe provided an ideal opportunity for this exercise (even though the words 'good faith' appeared only once in the judgment of the court, and then not in the context of the relationship between the parties to the contract and the litigation).¹⁷⁹ The court was faced with a claim by Standard Bank against Mr. Dlamini under a credit agreement for the financing of a motor vehicle. Dlamini had bought a used car at a dealership in Pinetown (which acted as an agent for the bank in terms of the financing agreement), which he returned four days later because the vehicle malfunctioned. The bank claimed that Dlamini had voluntarily surrendered the vehicle in terms of the *National Credit Act* (or NCA),¹⁸⁰ because he had failed to notify the bank of the return of the vehicle to the car dealership, and they issued summons against him for the return of the vehicle, costs of suit and the costs of locating, removing, storing and disposing of the vehicle. The bank relied on clause 10.6 of the contract which provided that, because the transaction had not been entered into at the bank's registered business premises, Mr Dlamini could, within five

¹⁷⁶ Section 40(2) of the *Consumer Protection Act* 68 of 2008.

¹⁷⁷ See, for example, the (rather vaguely worded) provisions of s 40(1) of the *Consumer Protection Act* 68 of 2008, which prohibits the use of physical force against a consumer, as well as "coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct".

¹⁷⁸ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD).

¹⁷⁹ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 45.

¹⁸⁰ *National Credit Act* 34 of 2005. The bank relied on the voluntary surrender provisions as contemplated in ss 127(5) to (9) of the Act.

business days after signing the agreement, terminate it on notice to the bank's vehicle and asset finance division head office, and return or tender the return of the vehicle. If he terminated the agreement in this way he was obliged to pay rental for the use of the vehicle for the time that he had it and any reasonable costs the bank might incur to have the vehicle returned or restored to a saleable condition. The contract did not record that Mr. Dlamini was entitled to a refund in terms of the Act.¹⁸¹ Dlamini denied that he had voluntarily surrendered the vehicle; he had returned it after noticing that it was "jerking and smoking" when he drove it from the dealership (this vehicle was not a car-of-the-year finalist).¹⁸² The dealership had also not informed the bank of the return of the vehicle.¹⁸³ Mr Dlamini claimed that he was unaware that he had to notify the bank of the termination of the agreement in the prescribed manner, and he alleged that the car salesman who had dealt with him at the dealership (who, apparently, created the impression that he worked for both the dealership and the bank when he assisted Mr Dlamini to complete the paperwork to arrange the loan from the bank) had never explained the terms of the agreement to him.

Pillay J held that the only issue in dispute on the facts was whether or not Dlamini knew and understood the terms of the agreement (specifically relating to his duty to inform the bank of the termination of the agreement). Before returning to the facts of the case, it bears noting that the court decided the matter on the basis of the bank's reliance on *caveat subscriptor* and quasi-mutual assent based on Mr. Dlamini's signature on the credit agreement. The learned judge, interestingly,

¹⁸¹ Section 121(3)(a) *National Credit Act* 34 of 2005.

¹⁸² "On driving it from the dealership he had noticed that it was jerking and smoking. He consulted his cousin, a mechanic who testified in corroboration. After they test drove it for about two kilometres they diagnosed that it would not last for more than 30 kilometres. They discovered that the vehicle was rebuilt following an accident. As predicted, it broke down and they had it towed back to the dealership." *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 6.

¹⁸³ As Pillay J observed (*Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 10): "Strangely, although the Bank authorised its agent at the dealership to forward applications for credit, explain the terms to consumers and attend on signing credit agreements, it did not authorise its agents to receive vehicles on its behalf when agreements were terminated. Nor did it expect its agents to notify it of the termination."

decided that this case implicated Dlamini's right to equality under the Bill of Rights.¹⁸⁴

However, when the NCA applies, the constitutional right to equality comes to my mind immediately. The Preamble to the Constitution and to the NCA connect them. What then is the interface between the Constitution, NCA and the common law principles of *caveat subscriptor* and *quasi* mutual consent?

The court proceeded to examine the concept of substantive equality under our *Constitution*, and the ways in which legislation (including the *National Credit Act* and the *Consumer Protection Act*) aim to outlaw unfair discrimination against previously disadvantaged consumers. Following the court's consideration of case authority on the *caveat subscriptor* rule as well as the provisions of the *National Credit Act*, the court found that Mr. Dlamini was not bound to the notice requirements under the contract and, in fact, that for a number of reasons the credit agreement was unlawful. Ultimately, Pillay J held as follows:¹⁸⁵

The unlawfulness on all the grounds established above is a breach of the right to equality in s 9(1) of the Constitution. The Bank conducted this transaction oblivious of the purposes of the NCA. Notwithstanding the manifest inequality in its relationship with its bargaining counterpart it sought to snatch an advantage.

I will not evaluate the correctness of the court's approach in this case here (beyond remarking that the learned judge's automatic recourse to the constitutional equality right was not explained,¹⁸⁶ and that such direct recourse to section 9 of the Bill of Rights also appears strange in light of the Constitutional Court's preference for indirect application as expressed in *Barkhuizen v Napier*¹⁸⁷). What I would like to do is to briefly examine the potential application of an ethical standard of good faith based on the facts of the *Dlamini* matter and the court's findings regarding the circumstances surrounding the conclusion and enforcement of the credit agreement.

¹⁸⁴ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 27.

¹⁸⁵ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 76.

¹⁸⁶ One commentator has questioned whether parties to contracts are under a positive duty to promote substantive equality (equality of outcomes) for their counterparts (although the cogency of this argument is up for debate) - see Jordaan 2004 *De Jure* 58.

¹⁸⁷ Even though it should be noted that Langa CJ, in his partially dissenting judgment in *Barkhuizen v Napier* 2007 5 SA 323 (CC), was of the view that direct application is not necessarily precluded in the context of private contracts (*Barkhuizen v Napier* 2007 5 SA 323 (CC) para 186).

In the light of the foregoing discussion, consider the following observations by the court (which I quote extensively here):

-[T]he gap in the bargaining relationship between the consumer and the credit provider is huge.¹⁸⁸

-Mr Dlamini is functionally illiterate and does not understand English ... Mr Dlamini completed schooling at standard one. At 52 years, he is an unsophisticated African male. He had difficulty in the witness stand engaging with the documents. He had become so excited about the purchase of a vehicle that he paid little attention to the repayment plan. He relied on the Bank to deduct reasonable instalments. He did not expect the Bank to deduct a high amount that left him without the means to support himself, his wife and his two little children. He expected to discover what the amount of those instalments would be when the Bank deducted its first instalment from his account. He trusted his bank. On discovering that he bought a defective vehicle he returned it intuitively to the person who sold it to him.¹⁸⁹

-Disclosure of only subsec (3)(b)¹⁹⁰ creates the impression that consumers have no choice but to pay the Bank even when the [dealer] sells them defective vehicles. Such non-disclosure and selective disclosure is

¹⁸⁸ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 52.

¹⁸⁹ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para. 23.

¹⁹⁰ The court held as follows regarding the disclosure of the consumer's rights under the *National Credit Act* in the bank's standard form agreement (*Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) paras 38, 41): "Clause 10.6 of the agreement paraphrases s 121(1), (2) and (3)(b) of the NCA but studiously excludes any reference to subsec (3)(a) which gives the consumer the right to a refund from the credit provider. Subsection (3)(b) clearly favours the Bank; the consumer has to pay the Bank. Subsection (3)(a) which favours the consumer because the Bank must to pay (*sic*) the consumer is omitted ... Non-disclosure of s 121(3)(a) violates the right of consumers to education and information in terms of s 3. The Bank's selection of what parts of s 121 of the NCA it should record in the agreement and what it should exclude is deliberate and deceptive. The heading of s 121 highlights its purpose as the 'Consumer's right to rescind credit agreement'. Instead of informing the consumer of this right, the Bank pitches it as an onerous bundle of obligations on the consumer to pay the Bank the costs of renting and recovering the vehicle. Projecting the consumer's obligations whilst understating his rights discourages rescission which is the consumer's statutory right."

designed to deceive consumers. Such deception conflicts with the letter and spirit of the NCA. Above all, it reinforces the patterns of inequality and inequity that persist in South Africa.¹⁹¹

-The Bank gave [the used car dealership] no mandate to report vehicles that were returned within five days in terms of the termination clause 10.6. Such a business practice makes credit transactions unduly onerous and a veritable trap for poor, illiterate and disadvantaged people who intuitively would return defective goods to a supplier and ask for a refund.¹⁹²

-Given the importance of the notice to the Bank of the basis of the termination, the Bank should have mandated its agent to assist consumers like Mr Dlamini to fax the notices. Even if the Bank and its agents provided this service at a fee it would have been far cheaper than litigating to determine the basis of the termination.¹⁹³

-[The *National Credit Act* imposes] the onus on credit providers to inform their consumers of their rights and responsibilities. Relying on agents whose interests as second hand car dealers conflicted with consumers' interests needed better control of the agent to avoid any finding that the Bank was complicit.¹⁹⁴

-In this case the form of the credit agreement presents a two-page A4 size document in size eight font. Part B of the agreement which incorporates the terms and conditions, an acceptance form and an authority to release goods form is seven pages. The terms and conditions span over five pages incorporating 18 main clauses with several sub-clauses. Clause 1 is a list of definitions usually found in complex agreements and legislation. For

¹⁹¹ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 42.

¹⁹² *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 44.

¹⁹³ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 45.

¹⁹⁴ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 49.

lawyers and lay persons alike, the form of the Bank's standard agreement is an unappetising formidable read. For a labourer like Mr Dlamini who did not read, write or understand English there might just as well have been no written agreement at all.¹⁹⁵

-Distorting the balance created in the NCA in this way in the agreement is unlawful. It defeats the purpose and policy of the NCA and renders the entire agreement unlawful.¹⁹⁶

-So by the time the Bank issued summons on 3 March 2011 it was well aware that the agreement had been terminated and the vehicle repossessed. Consequently, this action for confirmation of the termination and the return of the vehicle was wholly unnecessary. Why the Bank framed its relief in these terms remains unexplained. Penalising and intimidating Mr Dlamini are aims that cannot be excluded.¹⁹⁷

-Cumulatively considering the unexplained tactics the Bank employed, this action is heavy handed intimidation in response to Mr Dlamini seeking to enforce his right to rescind the agreement and claim a refund. The Bank's conduct in initiating and pursuing this action is unlawful for the further reason that it is irrational.¹⁹⁸

I have little doubt that a court armed with direct recourse to the application of an ethical standard of good faith based on the legal convictions of the community (and, especially, *ubuntu*) would have little difficulty in finding that the above facts and findings in *Dlamini's* case show a clear breach of such a standard, and that the bank's conduct in the circumstances was unlawful and unconstitutional. Mr. Dlamini was in every sense reduced to an object of economic gratification for the bank, and the bank failed to show him the required respect as counter-party to the contract.

¹⁹⁵ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 52-53.

¹⁹⁶ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 66.

¹⁹⁷ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 72.

¹⁹⁸ *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 76.

The bank would appear to have abused its economic and bargaining power over an illiterate and ignorant individual, and propounded the insult and injury through its choice of litigation (and litigation tactics). *Standard Bank v Dlamini* provides an example not only of how such recourse to good faith would assist litigants faced with such overwhelming obstacles in the protection of their rights; it also shows why we need such a mechanism for the pursuit of substantive equity in contracts (especially considering that this case involved a contract concluded under consumer protection legislation, with clear proof that the credit provider - one of the largest commercial banks in the country - had not aligned its standard form contract and practices with such legislation and was, apparently, simply doing 'business as usual' with little concern for the rights and interests of the consumer).¹⁹⁹

As argued above, I believe that specific content can be given to an ethical duty of good faith by the courts. On a broader level, I believe that justification for such an exercise in terms of the legal convictions of the community can also be found in the minority opinion of Sachs J in *Barkhuizen* (even though his views were expressed in the specific context of the law's treatment of standard form contracts):²⁰⁰

[W]hat is required is neither a blanket acceptance of standard-form terms, nor a blanket rejection, nor an *ad hoc* determination by each Judge in

¹⁹⁹ It is interesting to consider the potential relevance of another recent KZN High Court judgment, in the matter of *Silent Pond Investments CC v Woolworths (Pty) Ltd* 2011 6 SA 343 (D). This matter involved a franchising agreement which included an express provision for the observance of good faith in the dealings between the parties, in the following terms (as contained in clause 41.4 of the agreement): "In implementation of this agreement, the parties hereto undertake to observe the utmost good faith and they warrant in their dealings with each other that they shall neither do anything nor refrain from doing anything which might prejudice or detract from the rights, assets or interest of the other of them." Even though the agreement contained this provision (and the First Respondent's failure to observe such level of good faith, by opening a competing branch of its supermarket franchise in the vicinity of the existing franchise, was thus found to constitute breach of contract), Morley AJ made the following analogy and observation in the course of his judgment, which I would suggest is possibly more widely germane in terms of my suggested ethical standard of good faith (*Silent Pond Investments CC v Woolworths (Pty) Ltd* 2011 6 SA 343 (D) para 77): "One could liken the present situation to McDonalds Inc, owners of the well-known fast food restaurant chain, granting a franchise for a fast food restaurant in a particular locale and then opening its own fast food restaurant next door. McDonalds Inc would hardly be regarded as acting in good faith and neither can the First Respondent be regarded as having acted in good faith in its conduct in this matter. In my judgment, *it is placing its own interests above those of the Applicant and it is simply not entitled to do so.*" [My emphasis]

²⁰⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 146.

accordance with his or her personal predilections as to what is fair or not. What is needed is a principled approach, using objective criteria, consistent both with deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society. More specifically it calls for examination of the "tendency" of the provision at issue and the extent to which, in the context of the contract as a whole, it vitiates standards of reasonable and fair dealing that the legal convictions of the community would regard as intrinsic to appropriate business firm/consumer relationships in contemporary society.

Ultimately, however, and as already suggested, it would be the task of the courts to determine the parameters of such an ethical duty of good faith based in the *boni mores* and *ubuntu*. The fact that this exercise would have to proceed on a case-by-case basis, however, should not detract from legal certainty in the application of such a standard of good faith. I will refer the reader again to the views of De Vos (ie that the "notion that legal rules provide almost absolute legal certainty is an obvious fiction that cannot bear scrutiny")²⁰¹ and of Barnard-Naudé, who believes that judges act under a legal duty to "calculate with the incalculable" ("It is when judges pretend or desperately cling to the belief that the judicial decision can be a simple calculation, a simple rule application, for which they are ultimately not responsible because the law is the law and precedent is precedent, that things become worryingly meaningless").²⁰²

And, even if these are inaccurate descriptions of the process of legal adjudication, I would submit that the effects of any legal uncertainty that might result would, at least, be tempered by the fact that our courts would be motivated by the intention

²⁰¹ De Vos 2011 www.constitutionallyspeaking.co.za. Compare also the view as expressed by Leggatt J in the previously-quoted *Yam Seng PTE Ltd v International Trade Corporation Ltd* 2013 EWHC 111 (QB) para 152: "[T]he fear that recognising a duty of good faith would generate excessive uncertainty is unjustified. There is nothing unduly vague or unworkable about the concept. Its application involves no more uncertainty than is inherent in the process of contractual interpretation."

²⁰² Barnard-Naudé 2011 *Stell LR* 171-172.

to actively pursue substantive equity in the cases before them. And the establishment of a culture of good faith adjudication would surely serve a preventative or deterrent function and, eventually, translate into the negotiation and enforcement of contracts that are more in line with the good faith standard. This could, ultimately, go some way towards obviating the need for such adjudication by our courts by ensuring that only the most egregious cases of bad faith will end up in court, thereby eliminating the hard cases that make for bad law. Should we really ask for much more than that?

5 Conclusion

In this piece I have argued that the Supreme Court of Appeal's current understanding and apparent devaluation of the role of good faith in contract law is wrong, and that this court has not sufficiently explained and defended its 'conservative' stance on good faith in respect of its apparent conviction that "this road leads to uncertainty in contract". I have also pointed to the fact that the Constitutional Court has provided strong indications not only of a possible view that the SCA's understanding of good faith is incorrect, but also of a willingness to change the law as soon as an appropriate opportunity presents itself. More specifically, I have argued - and I must admit that this is not a novel argument²⁰³ - that a robust role for good faith can be developed, based on the legal convictions of the community (or *boni mores*), and that the SCA has not sufficiently explained its rejection in *Brisley* of the idea of the application of the *boni mores* to contracts. There are strong indications from the CC that *ubuntu* will be used to develop a more robust role for good faith, which appears unassailable in the light of the constitutional value system (including the role of *ubuntu*) and the nature of good faith as a key legitimating principle in contract law. I believe that the fears of legal uncertainty in respect of the application of a robust good faith doctrine may be illusory if one considers that it is possible to formulate and develop an objectively

²⁰³ See, of course, the minority judgment of Olivier J in *Eerste Nasionale Bank van SA v Saayman* 1997 4 SA 302 (SCA); see also Lubbe 1990 *Stell LR* 17; see also the judgment of Davis J in *Mort v Henry Shields-Chiat* 2001 1 SA 404 (C).

verifiable, ethical standard of conduct in contracting, which would be little different from our courts' use of public policy to date.²⁰⁴

When the (then) Appellate Division so famously 'buried' the *exceptio doli generalis* in *Bank of Lisbon*²⁰⁵ it did so relying quite heavily on the fact that this "superfluous, defunct anachronism"²⁰⁶ had never been received into our law, because *all* our contracts are, fundamentally and as a matter of first principles, viewed as being contracts *bonae fidei*. It is ironic then that this same court - and especially so in its new guise in our constitutional era - has failed to properly recognise this centrally important good faith component of contracts, through a limp-wristed conception of *bona fides* as nothing more than a footnote (or *fine print*) to the text (the text that is the less 'slippery' and more easily quantifiable black letter doctrines and rules of our law of contract). The *exceptio* would be superfluous only if the common law recognised a comparable mechanism to achieve the same aims; but in its failure to assert this elementary logical precept it would appear as if our courts have failed us. In the final analysis, I believe that the time has come for the courts to realise that, as Liew observes, a robust doctrine of good faith is not something that is at all at odds with the objectives of our law of contract or its continued legitimacy and existence (although it may very well be at odds with some central precepts of our economic system,²⁰⁷ which may, in any event, require re-evaluation in due course as part of the greater constitutional project):²⁰⁸

²⁰⁴ In respect of the use of public policy and fears of uncertainty, see Kruger 2011 *SALJ* 739.

²⁰⁵ *Bank of Lisbon and SA Ltd v De Ornelas* 1988 3 SA 580 (A).

²⁰⁶ *Bank of Lisbon and SA Ltd v De Ornelas* 1988 3 SA 580 (A) 607B.

²⁰⁷ MacQueen "Good Faith in the Scots Law of Contract" 9 highlights a prominent concern of the Common Lawyer when faced with suggestions for a robust doctrine of good faith, one that is strongly reminiscent of our SCA's stance on the issue: "A common concern is the uncertainty which would result from the introduction of a standard of uncertain content with strong moral overtones, and the damage which would be done to the commercial contracting practices which have provided the bedrock of English contract law. Traditionally its approach has been founded on the perceived bases of a market economy, emphasising the right of each party to pursue its own interests, whether in the creation or the exercise of contractual entitlements, and to leave the other to do likewise; not at all consistent with a positive requirement of good faith, with its stress upon the need to take account of the other party's position and the regulation of abuse of right."

²⁰⁸ Liew 2012 *Sing JLS* 440.

Good faith, properly understood, is not alien to the institution of contract; on the contrary, without mutual trust, candour and sincerity, it is difficult to see how contracts could be agreed at all. If these premises are accepted, then the way is open for an obligation of good faith to be implied in law into every contract. What the content of that obligation is, however, must always be fact-specific, taking into account the intentions of the parties, the purpose of the contract, and the relevant matrix surrounding the contract's formation and operation. In other words, while a default obligation of good faith may be implied into every contract by law, the precise scope or extent of that obligation will always be a matter of construction or implication in fact. Such an approach adequately balances the communitarian interests of the proponents [of a robust doctrine of good faith] with the opponents' rightful insistence that agreements should be rooted in the will of the parties, and that contractual rules must therefore be clear and predictable in order to facilitate the implementation of such intentions. Being guided by the parties' intentions in this regard thus gives the doctrine of good faith both legitimacy and practicality.

Once we accept the natural place for good faith, we can start to use it to better develop not only our law of contract but to enrich the tapestry of our very society. We will still, and for some time to come, be faced with the colonial tradition of our legal system (including, in the current context, the law's apparent long-held preference for the classical, liberal theory of contract law), as well as our relatively unique socio-economic conditions and the realities of our extremely unequal society. Recourse to the law is still mostly the domain of the privileged (and they are no longer, necessarily, only previously-advantaged, white South Africans - the bad guys are no longer so easy to spot). In the face of these dichotomies, it is clear that not all the kids in the playground can be trusted to play fair without some form of communitarian ethical policing. The *Constitution* is there, very explicitly, to protect the weaker kids against the bullies.

Assumptions of autonomy and unfettered volition so inherent in our courts' conception of 'freedom of contract' (which are assumed to exist - *res ipsa loquitur* - upon the proof of the formal validity of a contract) are unrealistic. And they are dangerous when viewed through the prism of the constitutional values (such as dignity and equality), as our courts' continued preference for such notions of the classical, liberal theory may serve to promote the abuse of private power²⁰⁹ and to

²⁰⁹ As De Vos observes regarding the courts' reluctance to fulfil their constitutional mandate under s 39(2) by developing the rules of the common law of contract in the image of the constitutional values: "Basic assumptions about freedom of choice and the essential equal power of people in society, which underlie many common law rules but are in fact fictions propagated by the rich

reduce contracting parties to objects of economic gratification for their counterparts.²¹⁰ Judicial conservatism, which serves only to perpetuate a refusal to acknowledge an active role for the courts in levelling the playing field, does not only add insult to injury; it frustrates the achievement of the constitutional, transformational agenda and is, in fact, unconstitutional in terms of the courts' constitutional mandate contained in section 39(2) of the Bill of Rights.²¹¹ The time has come for the common law of contract to more realistically (and less rigidly and formalistically) police the playground and the conduct of the 'big kids', by means of proper recognition of an ethical standard of conduct which derives from the legal convictions of our ideal constitutional community.²¹² The law is perfectly entitled to require parties to contracts to show each other mutual respect and to realise (and *live*) the reality that contractual relations should be a mutually beneficial social relationship. Our law should serve to inculcate the idea(l) that contracting is more of

and powerful to ensure that legal rules remain rigged in their favour, would largely remain untouched." De Vos 2011 www.constitutionallyspeaking.co.za.

²¹⁰ As Naudé and Lubbe observed in the context of contractual exemption clauses: "There is a growing body of thought to the effect that in so far as good faith (*bona fides*) is an underlying principle of contract law, it imports, amongst other dimensions, that the pursuit of one's own interests be tempered by a measure of concern for those of others. The constitutional value of dignity dictates not only that agreements voluntarily entered into must be respected by the law, but also that the law of contract should secure 'a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity'. The notion that human dignity as a constitutional constraint on human choice might render an agreement entered into contrary to public policy has been recognised in respect of an agreement that infringes on a person's bodily integrity, and also in respect of an agreement that reduces a person to economic servitude. It is reflected in our common law's condemnation of agreements that promote forced labour and constitutes the essential premise of the *Sasfin* decision that an agreement which is so tyrannically one sided and destructive of the legitimate interests of one's contractual partner as to reduce him or her in an economic sense to a slave, is contrary to public policy. In principle, an exclusion clause which infringes the essence of a contract by undermining the basic relationship of reciprocity existing between the undertakings characteristic of the contract envisaged by the parties should likewise be regarded as legally problematic on account of its tendency to reduce a contracting party to an object of economic gratification of the other." Naudé 2005 *SALJ* 451-452 [references in the original omitted].

²¹¹ As Sutherland observes: "The preamble of the Constitution already confirms that society has to be fundamentally reformed. The Constitution makes a clear break with the preceding legal order. It is impossible to think that this break should not also have profound consequences for horizontal relationships. Many of the abuses of the apartheid system and much of the exploitation that marked apartheid society occurred on a horizontal level. Private law assisted in creating the values of apartheid South Africa against which the Constitution turns its face: equality must replace inequality, dignity repression and transparency suppression of information. A restrictive approach would rely on the public-private divide to an extent that simply does not accord with the basic tenets of our Constitution and society." Sutherland 2008 *Stell LR* 395-396 [references omitted].

²¹² Barnard-Naudé 2008 *Constitutional Court Review* (with reference to Davis J in *Mort v Henry Shields-Chiat* 2001 1 SA 404 (C)) 183.

a tandem skydive than a case of ruthlessly trying to push the other guy out of the plane after snagging the only parachute.

When one considers the prevalence of the inequality of bargaining power in modern-day commerce (and related issues and social realities which may affect the presence of free volition and choice on the part of contracting parties to determine the form, nature and consequences of their bargain), I believe that such an objective standard of ethical conduct - imposed on parties by the *boni mores* as evidenced in the constitutional values and, more specifically, *ubuntu* - might provide a powerful tool with which to level the playing field and ensure that all contracting parties are equal before the law and enjoy equal protection of the law.²¹³ When Wallis AJ, in *Den Braven v Pillay*,²¹⁴ controversially stated that the entrenched right to freedom of trade, occupation and profession in section 22 of the Bill of Rights should not apply to private contractual restraints of trade, Davis J called this approach a "mischaracterisation of the law of private power",²¹⁵ while Rautenbach accused the court of "deconstitutionalising constitutional rights" in order to treat them as ordinary interests when deciding private law matters.²¹⁶ I would suggest that a failure to recognise an ethical standard of conduct for contracting parties based in a constitutionally anchored duty of good faith would amount to deconstitutionalising the constitutional values, and especially *ubuntu*, in the context of one of our most important branches of private law. That the drafters of the *Constitution* could have had this in mind is inconceivable. And, even worse, it would only serve to perpetuate the common law of contract's current, apparent ambivalence towards the abuse of private power which, Davis J reminds us, is contrary to one of the fundamental aims

²¹³ Hawthorne highlights the classical liberal theory of contract's shortcomings in respect of the pursuit of substantive equality: "The response of the classical model in the guise of formal equality has proven to be illusory and new learning is developing models attempting to redress the balance in order to restore party autonomy, evaporated consensus, and mutual beneficence, in her quest to end exploitation of the weaker in society." Hawthorne 2010 *SAPL* 90. The problem is, of course, not unique to South Africa, and other systems characterised by great inequality (such as Brazil) have also wrestled with it: "Equality could no longer be viewed simply as freedom from governmental coercion, particularly in countries such as Brazil that have a dramatic concentration of wealth and power. This context has led to the idea that the parties to a contract should be viewed concretely in their differences, rather than abstractly as equal rights-bearing subjects." Da Silva Filho 2006 *Penn St Int'l L Rev* 407.

²¹⁴ *Den Braven SA (Pty) Ltd v Pillay* 2008 6 SA 229 (D) para 30.

²¹⁵ *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 3 SA 78 (C) 85B-C.

²¹⁶ Rautenbach 2009 *TSAR* 625.

of our *Constitution's* transformative agenda and which underlies its horizontal application.²¹⁷ On the subject of contract as one of the main branches of private law - and the fact that its importance can probably not be over-stated - it might bear repeating the words of a judge of the Belgian *Cour de Cassation*, on the state and role of private law in the 21st century:²¹⁸

Problems such as poverty, inequality of opportunities or housing cannot be addressed by private law, and private law should not be used to reach these goals. But of equal importance is the way that citizens deal with each other and what they may expect from one another. And this is exactly the role of private law, through concepts such as duty of care, good faith and proportionality and always balancing conflicting interests, using notions and theories that have come to us, constantly refined, after centuries of litigation, debate and legal thinking ... Efficiency or the creation of wealth is not, and should not be, the prime focus of private law. If the outcome of private law is efficient, all the better. Things go seriously wrong when this is forgotten ... The existence of a society, of a community, presupposes that its members interact with each other, whether to have a little chat or to enter into a contract. When they do this in the understanding that they are all subject to the same rules of law in this matter, then this also confirms their common identity. So in the end private law also contributes to the social cohesion and even to citizenship.

I referred earlier to the views of Justice Fritz Brand, which I view to be at odds with such a conception of the role of private law. Another stalwart of the Supreme Court of Appeal, Justice Joos Hefer, used quite strong language to dismiss both the SA Law Reform Commission's proposal for the enactment of unfair contract terms legislation,²¹⁹ as well as the calls for a more robust role for good faith in contracts under the common law.²²⁰ He did so by pointing out that the arguments of proponents of such a role for good faith have to date all been characterised by "the

²¹⁷ Davis J, in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 3 SA 78 (C), reminds us of the views expressed by Madala J in *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 163, as referred to above in the text: "Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society."

²¹⁸ Dirix 2010 *TSAR* 78-79.

²¹⁹ In SALRC 1998 www.justice.gov.za, referred to earlier.

²²⁰ Hefer 2004 *Journal for Juridical Science* 1-14.

complete absence of reference to the old sources"²²¹ of Roman and Roman Dutch law. The irony is that in the learned judge's article, published in 2004, the first and only reference to the *Constitution* appears in the final paragraph and, what is more, the reference is fleeting and reads like a thinly-veiled, *pro pacta sunt servanda*-laced afterthought.²²² With all due respect, I believe that some of our foremost legal minds may still need to make a mind-shift towards the realisation that the rules of the game have changed significantly. Justinian, Grotius and Voet are all long in their graves, and our law of contract *must* reflect its place within the constitutional order as well as the practical realities of our modern-day society and the needs of its most vulnerable members. That being said, however, one might argue that *ubuntu* in effect calls for a (re-)introduction of the centrality of values such as fairness and generosity in contract, which characterised the philosophies of some other golden oldies, like Aristotle and St Thomas Aquinas.²²³ *Ubuntu* - at least, in the way I understand the concept - also appears to show up in one of Rudyard Kipling's delightful poems, which might be apposite and worth quoting in part here:²²⁴

Now this is the law of the jungle, as old and as true as the sky,
And the wolf that shall keep it may prosper, but the wolf that shall break it must
die.
As the creeper that girdles the tree trunk, the law runneth forward and back;
For the strength of the pack is the wolf, and the strength of the wolf is the pack ...

Refusing to recognise a constitutionally-grounded ethical standard of good faith would rob those constitutional values of their force to shape not only law but also private conduct. In this way it would retard and illegitimately (and unnecessarily) arrest the development of an ethos of socially responsible contracting, which can perform such an important preventative role in enabling us to pre-emptively start to chip away at Woolman's "poverty and powerlessness of many South Africans ...

²²¹ My translation: "'n Opvallende kenmerk van die bydraes wat tot dusver oor die goeie trou gelewer is, is die algehele afwesigheid van enige verwysing na die ou bronne." Hefer 2004 *Journal for Juridical Science* 8.

²²² See Hefer 2004 *Journal for Juridical Science* 14.

²²³ See Hutchison 2013 *Stell LR* 5-6.

²²⁴ Kipling "The Law for the Wolves" (1895). This poem was also published, as "The law of the jungle", in *The Jungle Book* (1894), and it should be noted that an alleged letter by Kipling professing to plagiarism in writing this last work surfaced for auction in 2013.

through the structured silence of disputes that never make it to court".²²⁵ Davis, with reference to Hale, believes that the axiomatic 'hard rules' of contract law cannot provide a neutral backdrop for private economic relations that are congruent with the ideals of our constitutional dispensation. He believes that these rules, ultimately, affect the distribution of wealth within our society, and thus the approach of our courts to the application of such rules has a profound role to play in the socio-economic conditions of our people: "[T] the invitation to adhere to the contractual shibboleths of the past should be declined if we are concerned with inequality and its clear companion in South Africa - poverty".²²⁶

Contracts are a mechanism by which individuals exercise many of their fundamental rights.²²⁷ In one of the world's most unequal societies, a progressive and equitable contract law can play an integral part not only in addressing the private abuse of economic power but also, eventually, in narrowing the gap between the haves and the have-nots. And that would contribute more broadly to the maintenance of social peace in a country that is increasingly characterised by the truly frightening symptoms of the frustrations of those have-nots, most prominently on display in nightly news bulletins in the form of increasingly violent service delivery protests, violent industrial unrest and wildcat strikes, and sporadic acts of xenophobic violence.²²⁸ *Ubuntu* may very well be the most ideal vehicle imaginable for the

²²⁵ Woolman 2008 *SALJ* 11. Lewis makes an interesting observation (with reference to the SA Law Reform Commission's report on unfair contract terms legislation, referred to earlier) in respect of the fears of legal uncertainty attendant on such legislation: "[I]t is interesting to note that those who fear floods of litigation simultaneously claim that most victims of contractual inequity cannot afford litigation." Lewis 2003 *SALJ* 345.

²²⁶ Davis 2011 *Stell LR* 862. Hawthorne would seem to agree: "[T]he rule of law and social transformation are inherently antagonistic. Thus the caution of the judiciary mandated to uphold the rule of law is understandable. However, 'the new learning' theories are developments taking place within the rule of law and represent the common denominator, that markets require steering in order to distribute wealth, to establish acceptable power relations and to provide meaningful opportunities. The introduction of the duties of solidarity and cooperation, an essential part of the relational contract theory concretised in the obligation of disclosure and transparency, would fit within the values and norms of the Constitution." Hawthorne 2010 *SAPL* 92-93.

²²⁷ Rautenbach 2011 *THRHR* 521.

²²⁸ As Thomas observes in respect of the experience of the application of *ubuntu* in socio-economic rights litigation: "It is not enough that considerable attention is given to morals in expositions of *ubuntu*. A shift is needed in a way that challenges neo-liberal discourse and practices. A starting point would be a focus on solidarity and communalism, which bear a 'family resemblance' to concepts used in defence of socioeconomic rights, and have redistributive goals aimed at

infusion of an ethics of responsible and mutually-respectful contracting, which would serve to contribute towards the achievement of greater social justice for the chronically disenfranchised more generally.²²⁹ Ultimately, a robust doctrine of good faith in contracts might play a significant role in order to save the day and resurrect the idyllic hopes of a starry future for our rainbow nation - one that started so positively²³⁰ but increasingly seems to be petering out into becoming yet another failed democratic experiment built upon shaky colonial foundations, with not enough political will amongst entrenched political elites to effect real transformation. A persistent refusal by our higher courts to entertain scope for the development of substantive equity in contracts would serve only to ensure that the majority of our people will - bar, possibly, at the ballot box - in most facets of their daily lives continue to be reduced to cannon fodder for those with economic power, who can proceed with impunity to personify unscrupulousness in their dealings with others under a "philosophy of winner takes all".²³¹ Without wanting to overstate the potential role of a robust doctrine of good faith, it might very well serve, ultimately, to be an integral component (if not the be all and end all) of Davis's "silver bullet" to eventually erase apartheid from the socio-economic landscape.²³²

We are all currently subject to a pernicious catch-22 situation regarding the development of the law on good faith in our highest courts. The SCA has unequivocally indicated that it will not revisit its current stance on the issue unless

ameliorating the class inequalities rooted in capitalist social relations. Such inequalities have socially and politically divisive consequences that threaten the political stability and consolidation of a fledgling democracy." Thomas 2008 *International Journal of African Renaissance Studies* 56-57. Greater substantive equity in contracts may very well be good for business, as Pillay J observed in *Standard Bank of SA v Dlamini* 2013 1 SA 219 (KZD) para 78: "Institutions such as the Bank should welcome the framework proffered by the [National Credit Act] and the [Consumer Protection Act] for bridging the socio-economic inequalities substantively and for reforming the credit industry, if for no reason but that sustained inequalities and need lead to unrest and social instability which is not good for business."

²²⁹ As Bohler-Müller argues: "I submit that the strategy of using *ubuntu* to enrich human rights and constitutional discourse should be seen having both political and ethical dimensions. I therefore remain convinced that the re-conceptualisation of *ubuntu* may take us beyond strategy to a future-oriented utopianism pointing to an "elsewhere" beyond our current conceptions of the legal and political as purely instrumental struggles for individual and group power." Bohler-Müller "Some Thoughts on the Ubuntu Jurisprudence" 480.

²³⁰ In the context of equity in contract, see Hawthorne 2003 *SAMLJ* 271.

²³¹ Hawthorne 2005 *SAMLJ* 221.

²³² Davis 2011 *Stell LR* 845.

told to do so by the Constitutional Court. The CC, in turn, has indicated an apparent desire to step into the breach, although Moseneke J has expressed caution in his observation that "we are deprived of the views of the High Court and the Supreme Court of Appeal in matters where their expertise would be helpful".²³³ Many ordinary South Africans simply can't afford to wait for very long for a resolution to this Mexican stand-off. The judges of the SCA should grasp the nettle, recognise their important role in "constitution-making",²³⁴ and undertake a real and meaningful reconsideration of the proper role for good faith in contracts, sooner rather than later. If they don't - or won't - we can only hope that 'those rogue judges of the Constitutional Court'²³⁵ will do the job for them, at the very first opportunity that arises.

²³³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 73

²³⁴ See Davis 2010 *SAJHR* 85-101.

²³⁵ De Vos 2011 www.constitutionallyspeaking.co.za.

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List of abbreviations

CLR	California Law Review
CC	Constitutional Court
Conn J Int'l L	Connecticut Journal of International Law
Fordham L Rev	Fordham Law Review
KCLJ	King's College Law Journal
NCA	National Credit Act
Penn St Int'l L Rev	Penn State International Law Review
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal

SALRC	South African Law Reform Commission
SAMLJ	South African Mercantile Law Journal
SAPL	South African Public Law
SCA	Supreme Court of Appeal
Sing JLS	Singapore Journal of Legal Studies
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif van die Suid-Afrikaanse Reg
Tul Eur & Civ LF	Tulane European and Civil Law Forum
U Colo L Rev	University of Colorado Law Review
Wash U Global Stud L Rev	Washington University Global Studies Law Review